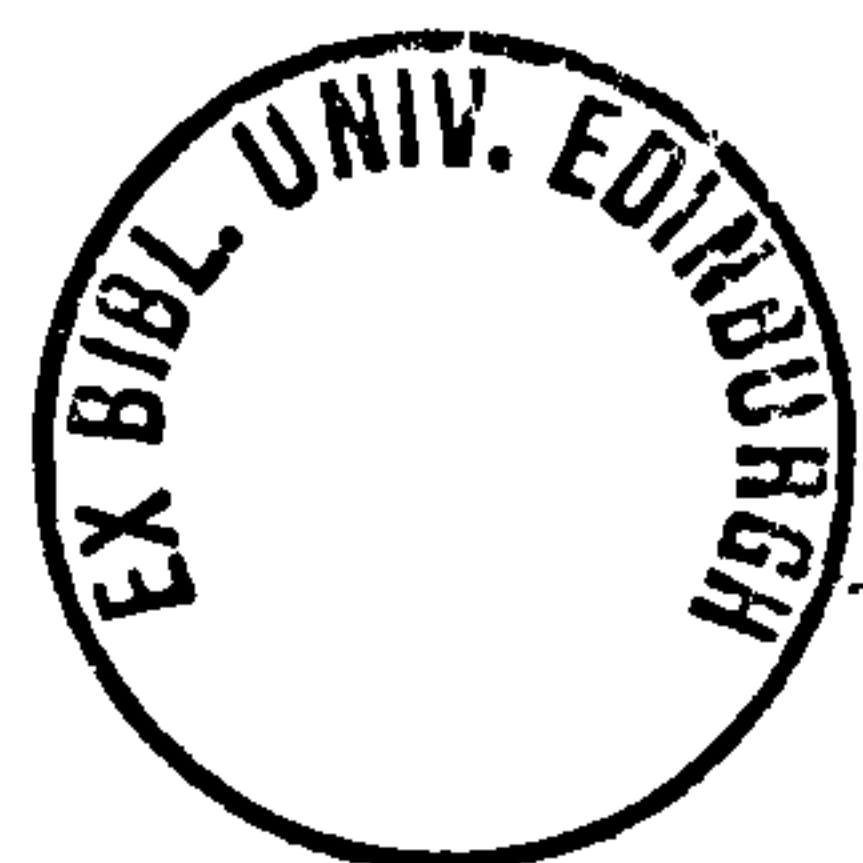


THE CRIMINAL LAW OF PRIVATE DEFENCE
IN
ENGLAND, SCOTLAND AND FRANCE

Michael A. Hay

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University of Edinburgh
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In accordance with Rule 2.4.15 of the Postgraduate Study Regulations,
I hereby declare that this thesis has been composed by myself, and is my
own work.

Michael A. Hay.

20th August 1987

To all my family, my parents in particular,
with my love, admiration and gratitude.

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The opinions expressed in this study are to be taken as strictly those of the writer. They are not to be assumed to reflect in any way the opinions of any persons or institutions who have been associated with the preparation of this thesis.

Les opinions exprimées dans cette étude représentent *strictement* celles de l'auteur, et de lui seul. Elles ne peuvent être considérées en rien comme reflétant d'une manière ou d'une autre les opinions de quelque personne ou quelque institution que ce soit s'étant trouvée associée à la préparation de cette thèse.

PRINCIPAL ABBREVIATIONS

All ER	All England Law Reports
BC	Bulletin des arrêts de la Chambre criminelle de la Cour de cassation
CAR	Criminal Appeal Reports
CP	Code pénal
Cr	Chambre criminelle de la Cour de cassation
Crim.L.R.	Criminal Law Review
D	Dalloz
djc	"Delivering judgement of the court"
GP	Gazette du Palais
Gaz. Pal.	Gazette du Palais
JCP	La Semaine Juridique
JC	Justiciary Cases
PC	Pleas of the Crown
RDS	Recueil Dalloz Sirey
RSC	Revue de science criminelle et de droit pénal comparé
S	Sirey
SCCR	Scottish Criminal Case Reports
SLT	Scots Law Times
VLR	Weekly Law Reports

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ABSTRACT

This thesis is a comparative study of the criminal law of private defence in England, Scotland and France. It focuses upon the substantive law in each jurisdiction, though reference is made, where necessary, to the evidential and procedural issues raised by the topic.

The intention has not been to provide an exhaustive and formalised categorisation of the law of private defence. Instead, an examination of the key areas has been attempted, reflecting, where appropriate, any particular interest the law in a given jurisdiction may show in specific fields.

The thesis divides in effect into two parts. The first three chapters are devoted to the examination of the general principles of the plea, while the latter examine its application and extension in three areas which, it is felt, are of particular interest and especially worthy of comment - namely property defence, resistance to unlawful process, and the issue of excessive defence.

"Il n'y a ni crime ni délit, lorsque l'homicide, les blessures et les coups étaient commandés par la nécessité actuelle de la légitime défense de soi-même ou d'autrui."

Article 328 du Code pénal

"Sont compris dans les cas de nécessité actuelle de défense, les deux cas suivants:

1. Si l'homicide a été commis, si les blessures ont été faites, ou si les coups ont été portés en repoussant pendant la nuit l'escalade ou l'effraction des clôtures, murs ou entrée d'une maison ou d'un appartement habité ou de leurs dépendances;
2. Si le fait a eu lieu en se défendant contre les auteurs de vols ou de pillages exécutés avec violence."

Article 329 du Code pénal

"Detached reflection cannot be demanded in the presence of an uplifted knife."

Holmes, J., Brown v U.S. 65 Law Ed 961 (1921)

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INTRODUCTION

It is perhaps one mark of organised society that the more sophisticated and complex its structure and pursuits, the more varied and numerous the ways in which death and injury befall the individuals of which it is composed. Roadways, mines, high-street banks, fairgrounds, nuclear energy - and now space exploration craft - all pose new threats in their own way, to supplement natural causes, Acts of God and the cruder forms of criminal homicide and injury which existed in early times.

New elements there may be within these areas of danger, but among them survives the oldest factor of all - aggression. There too, however, there is change: the development of society has brought with it an ever-closer examination of right and wrong within this balance of attack and defence.

Regrettably, a detailed analysis of the underlying rationale for the plea of private defence, which raises fascinating issues of its own, is beyond the scope of the present inquiry. However, it is necessary to state the assumptions upon which this study has been conducted. The first is that the plea of private defence is essentially a plea *in justification*. There are those who argue that any distinction between that and the concept of excuse is redundant, but this is not a view which the present writer shares. Indeed, it is the failure in the past to recognise the status which the plea has always merited as an affirmative reply to criminal charges that has given rise to problematic - and arguably inequitable - rules of law, which persist to this day, most notably in Scotland and England.

Secondly, private defence is a *right*, not a concession. The opening conditions for the plea are, as we shall see, somewhat detailed. But the *underlying* condition lies in the absence of State protection at the moment of attack. Preventive protection is the issue. Crucially, however, this is not to say that the State is the ultimate custodian of the defensive right. Rather, it is the writer's contention that private defence, certainly self-defence, is a right derived from natural law - specifically recognised as such by the French judiciary early last century, though this interpretation has admittedly become somewhat unfashionable - and one which does not lend itself to substantial manipulation by positive law.

Over the centuries, attempts have been made to present the plea as one grounded in the punishment of one's attacker; the enforcement of the legal order; social utility; or simply in the futility of punishment. Others have presented it as a variant of duress, or else a plea of necessity. Still others have described it as simply an operation of crime prevention, or even sought its explanation in the argument that the notion of defensive force fell totally outwith the scope of the law, and was therefore inimical to the latter.

However, while some of these theories contain features to commend themselves, each is open to quite specific, identifiable objections, and none satisfactorily explains the right. Ironically, some writers have in fact looked to the social contract as the ultimate foundation, while specifically rejecting the notion of natural law - failing to recognise the inherent contradiction in such a stance, as well as its question-begging nature. Civil society embraced private defence - it did not create it.

What natural law does not tell us, however, is the precise detail of private defence - here lies the key to the rôle of positive law. And it is to these conditions, and their application in certain areas of the law, that we now turn.

Some preliminary points, however, require to be made. Firstly, the term private defence is employed, as opposed to the misused term of self-defence. As we shall see, the right to use defensive force extends to third parties - and it is not restricted to the protection of the person. Where appropriate, the term 'self-defence' is used, to describe the violent reaction of an individual in his or her own protection.

Secondly, given the inherently ambiguous nature of private defence, where an attacker may become victim - and indeed where the converse can apply - the word 'defender' is generally used, to denote the person who originally finds himself the object of an unlawful aggression. It may further be pointed out that the use of the masculine is generally to be taken to cover both genders, unless the context indicates otherwise.

While this study is devoted to the substantive law of private defence, account has to be taken of the procedural context in which examination of the plea operates, and of matters such as the question of the burden of proof, where appropriate. The early procedures relating to the technical recognition of private defence have not, however, been detailed. Precisely how the courts tackled private defence of old remains a matter of great debate, and deserves a comprehensive study in its own right. Likewise the fascinating modern-day law of evidence and procedure applicable to this field awaits the attention of a willing observer, and lends itself in particular to a thorough, comparative examination covering - might one suggest - the present three jurisdictions.

So far as the jurisdictional scope is concerned, the majority of caselaw comes from England and France. There are, however, among the relatively small number of Scottish cases several which are of particular interest, and sources are sufficient to detect a quite consistent theme running through the law there. In addition, reference has been made to foreign authorities, particularly from America in relation to the defence of property, and from Australia in relation to the law of excessive defence. This has been done in those cases where it was felt that they shed useful light on a particular aspect of private defence. Where appropriate, reference has been made to the valuable discussions of those French authorities writing prior to the enactment of the *Code pénal* of 1810.

The law is stated as at 31st December 1986.

CHAPTER ONE

THE ATTACK

In this chapter, we consider the various conditions, relating to the act of aggression, which the law in all three jurisdictions imposes, and their various implications for the exercise of defensive force.

1. Existence of the Attack

A defence naturally presupposes the existence of an attack. The interpretation of this word "existence" is not a matter of mere idle debate but is of critical importance in the analysis of private defence. We shall now examine the approach adopted in all three jurisdictions towards what one might term the reality of the attack. ¹

A. Real Attack Private Defence

In situations where one finds oneself caught in gunfire ², or faced with the sight of a blade thrust at one's chest, both the fact and degree of danger are indisputable, and the objective necessity for defensive action is clear. The intentions of the aggressor are so certain to the victim that his attack may properly be considered as fact in every sense of the word; there is hardly room for interpreting his act as anything else but an unlawful attack.

However, absolute certainty in any field is a somewhat elusive commodity, and no more so is this the case than in the interpretation of violent confrontations between individuals, coloured as they are by fear, anger, rapid judgement and sometimes reflex actions in face of a threat which may be clear in its existence but ill-defined in its nature and gravity. Indeed, one might rightly say with irony that perhaps the only proof that an attack-legitimate-defence situation existed is the sure testimony of the corpse or the broken body of the innocent victim who failed to exercise his natural right. ³

But the essence of the plea is preventive action, not inaction. And given that defensive action has been taken, all three jurisdictions recognise the overwhelming importance of the combined factors of human fallibility and the inherently conjectural nature of most cases of private defence. ⁴ It is for this reason that of greatest practical and theoretical import are situations other than the unequivocal, certain aggressions here described.

B. Reasonable Belief Private Defence

We shall now look at the question of what more general factors the courts will take into consideration in determining whether or not a given situation did give rise to a right of private defence. And the most basic principle which they recognise is that in judging his (or her) actions, the question of what the circumstances reasonably led or could have led the accused to believe at the moment of alleged attack is of prime importance. This notion was splendidly caught around the turn of the century by the *Chambre d'accusation de Chambéry*, which declared that:

"L'article 328...n'a pas seulement en vue le cas d'une nécessité éclatante, absolue, indiscutable, mais encore le cas où celui qui se défend peut raisonnablement croire qu'il se trouve en péril." ⁵

And these few well-chosen words neatly encapsulate the approach of doctrine and jurisprudence on both sides of the Channel. In the case of *R v Weston*, Lord Cockburn, C.J. invited the jury to ask themselves whether "the gun (was) levelled by the prisoner at the deceased in self-defence against an attack of the deceased, endangering life or limb, or reasonably apprehended by the prisoner as likely to do so" ⁶ while in *Hillan v H.M.A.* Lord Justice-Clerk Aitchison spoke of "...protection to ward off actual danger or danger to be reasonably anticipated." ⁷

The similarity in terminology is indeed striking, and journals and caselaw both ancient and modern are replete with expressions such as

"reasonable apprehension", "reasonably believed", "justifiably feared", "croire raisonnablement", "légitimement faire croire", "vraisemblable" and so on. *

This concession of the law to human frailty in the face of an already uncertain world has, however, two sides to it. It falls therefore to be introduced firstly in its broad, and later its narrow, implications.

It is firstly broad, in that it is not necessary to a successful plea of private defence for one to have acted according to what the situation was in reality - indeed, one's point is that it will almost always be virtually impossible to determine this for firstly, many events will have contained a certain element of ambiguity. Secondly, one is dealing with an individual who in most cases will have acted while in a state of great mental stress, if not near panic. It is well-established - as we shall see even more evidently when we come to look at the conditions of the defensive riposte - that the law will not in such circumstances demand of the defender an unreasonably fine degree of judgement and self-control. And thirdly, and most crucially, one must appreciate the inherently speculative nature of private defence. For by definition, one is dealing with an attack which was never fully consummated, having been halted in its tracks. * Protective prevention is the object of private defence.

It is evident then that there is a substantial degree of speculation involved, albeit varying according to the different circumstances of each individual case. It is surely obvious, then, that the manner in which one arrives at a given belief will often vary according to the circumstances of each particular case, and that the law must take account of this. 10 Its benefit to an accused is two-fold.

Firstly, given that a plea of private defence occurs within an examination *a posteriori* of the incident, in the cold light of the courtroom, scrutiny of the surrounding circumstances serves to counter the redoubtable problem of proof which faces an accused, and which, as Professor Williams remarks, looms particularly large when the case is one of homicide: "When looking back at the incident, the fact likely to make the strongest impression is that a man has been killed; the transitory fear felt by the person prosecuted has left no memorial to compare with the tragic reality of

the corpse." '1 The courts therefore may take a broad view of the facts to gain a fuller idea of the context in which the accused acted; in other words, to understand more fully his or her 'plight' on the moment.

Secondly, the benefit is one of substance. For a 'circumstantial' appreciation of the incident in question leads, or, at least, should lead the triers of fact in most cases to a more favourable and indulgent view of the accused's actions. Consider D, of very slight build, who is attacked (a) when alone (b) at night (c) on a lonely road (d) by A, a 15 stone boxer (e) convicted for violence and (f) who has previously threatened D. The jury would probably be quite willing to believe that D's fear of violence, and of serious violence was "reasonable" and that in these circumstances too much could not be expected of him in such moment of crisis.

It does seem that this circumstantial approach is more apparent in France than in Britain, though one should be careful not to make too much of the difference. The reason lies, it is submitted, in the fact that we are constrained by the niceties of rules of evidence, in stark contrast to the wide, sweeping, inquisitorial approach of the French system of justice.

Thus it is that French courts have often been at pains to point out the existence of prior or imminent threats by the alleged attacker; '12 his reputation (as being mentally unbalanced, for example); '13 his status as a wanted criminal, this being known to the accused; '14 the time and location of the attack; '15 and the occurrence of previous attacks by the aggressor. '16 In both England and Scotland it is this last issue which has prompted most judicial soul-searching, but this has still not prevented courts there from on various occasions referring to or permitting the leading of evidence in relation to prior acts of the deceased or the alleged attacker '17.

It is submitted that this latter approach is only good sense - for any factors which are likely to heighten the fear of any reasonable person must surely be relevant to a plea which rests precisely on that person's reaction to the danger itself. '18

Typifying the substantive approach in France is the decision of the Cour d'appel de Paris 9 octobre 1978 (Sencier) ¹⁹. There, the accused (Sencier) was a police officer who at 2.30 a.m. found himself separated from his colleagues, and chasing one of two suspects across a quiet, deserted scrapyard. He took out his service weapon and finally caught up with the fugitive. On being ordered to get up, G jumped up, kicking out and lashing wildly, whereupon Sencier shot and injured him. The Court upheld the acquittal:

"Considérant...qu'il poursuivait seul, en pleine nuit, et en des lieux obscurs qu'il connaissait mal, l'auteur d'une tentative de vol; qu'il savait qu'un autre participant à cette tentative, celui-là armé d'une pince monseigneur, avait réussi à disparaître dans la nuit et qu'il pouvait craindre à tout moment son apparition pour prêter assistance à son compagnon moins heureux que lui dans sa tentative de fuite; que, devant la réaction violente de Guyot lors de son interpellation, il s'est trouvé dans la nécessité de se défendre; que cette défense légitime de soi-même commande la relaxe de Sencier." ²⁰

It is no objection that this case involved a policeman, and therefore is of dubious authority, for despite - or because of - their weaponry, French policemen are placed in the unbelievable position of being obliged to rely only on private defence for the use of their firearms ²¹. Consequently, the French courts seem rather indulgent in interpreting the actions and beliefs of officers of the law and for very good reason, given the climate and risks in which they operate. But this 'circumstantial' approach is equally detected in some important cases involving members of the public.

In Dijon 9 janvier 1965 (Arcelin et Jacquin) ²², the *Cour d'appel* found in favour of the accused, manager of a cinema who had confronted a burglar at night on his premises. The latter had indeed demonstrated just how dangerous he was by attempting to wrest the accused's gun from him as he held him at bay. When he made a sudden rush for the door, the accused fired several shots from the hip in rapid succession at the fleeing intruder - and despite the objective lapse in danger the Court found self-defence shown, on

what had been essentially a reflex action by the accused, in particularly frightening circumstances. Very similar in this respect was the decision of the Cour d'appel de Nancy 9 mars 1979 (Bastien) ²³. There, the accused had surprised two raiders of his chicken-coop, and was leading them at gunpoint to the *gendarmerie*, when, after whispered agreement, one bolted off while the other swung round violently and confronted Bastien, who instinctively pulled the trigger. The Court, in acquitting him, framed its reasoning in some of the most subjective terms ever found in French case reports.

However, while the decisions merit enthusiastic approval, they also invite caution in their interpretation ²⁴ for it is submitted that this is probably the furthest that the courts will venture in their application of Article 328 private defence, and a studied observation of French jurisprudence reveals that there is still a strong objective control to the interpretation of the terms of Article 328. Even in the above cases, it will be found that the courts were at pains to secure the analysis to various *objective, concrete 'moorings'*, such as the late hour and darkness, location, sudden movements and so on, all of which, while affecting the individual in his or her perception of the situation, are nevertheless objectively recognisable factors.

What these *faits concrets* really represent is the restrictive application of this issue of "reasonable belief", emphasis now being focussed on the word "reasonable". Hence, while the courts are quick to point out that it is sufficient that the accused could have ("*a pu*") believed himself in danger, ²⁵ this "could" is still delimited by objective parameters. Subjectivism is not allowed a free reign - and this quasi-objective control is evident in many case reports. ²⁶

In Scotland, there is no doubt that the courts impose such parameters, but one may question whether they are not too rigidly and narrowly set. In 1937 the High Court of Justiciary delivered a judgement which adopted this 'circumstantial' approach - only to be disavowed by the bench in another appeal thirteen years later. ²⁷ The appellant in Hillan v H.M.A. ²⁸ sought to have his conviction for assault quashed. In allowing his appeal the court took a sensible *in concreto* view of the incident, placing great emphasis upon the particular facts and circumstances surrounding the incident in

question. It appeared that Hillan, an apparently respectable man of twenty, was called over to a cubicle in a public lavatory, where he was sexually importuned and assaulted by an elderly man, and thereupon struck him. The court upheld his plea of self-defence, pointing to the fact that the youth was confronted in a confined space, with the door snibbed and the exit blocked, and placed some emphasis on the nature of the anticipated attack.

Now while the various judgements do deserve criticism on other grounds, ²⁹ these bear no relevance to the merits of the self-defence plea, and the writer cannot but disagree with the words of Lord Justice-General (Cooper) who felt bound to say that he had "*considerable difficulty still in understanding how, in the case of Hillan, self-defence came to be regarded as a relevant plea.*" ³⁰ In any case, Hillan still waits to be expressly overruled, and it is submitted that it remains good - though regrettably unrepresentative - law.

Highly problematic is the characteristic of Anglo-Scots caselaw and doctrine that the issue of reasonable belief is simply left to a bald assertion, and Burnett could be speaking for the academic as much as for the jury when he says "*though it may sometimes be difficult to say what is a reasonable ground of apprehension.*" ³¹ The underlying assumption throughout the caselaw is that the issue is essentially one for the jury, and this can only be right, given the multitude of permutations in the incidents which day to day give rise to defensive violence, each case depending on its own particular facts. ³² And in such cases the circumstances of time, place, reputation of the attacker and so on are obvious indicators.

An extension of the principles outlined above, and recognised again in all three jurisdictions is that an acquittal may follow where the accused was labouring under an error of fact. This is simply a logical application of the normal principles of *mens rea*, although we shall see shortly that such forms of 'private defence' do raise special issues of their own.

C. Putative Private Defence

In situations of putative private defence subsequent examination reveals that the accused was in reality in no danger from his victim, although the facts at the time led him in good faith to believe the contrary. The attack existed only in the mind of the accused, who misinterpreted the acts or words of the injured party and relied upon his erroneous assessment. All three jurisdictions have recognised the plight of the accused in such instances, and, provided his error is reasonable, he may be acquitted. ³³

The most frequently cited English case is perhaps that of *R v Rose*. ³⁴ There, the accused killed his father, believing that his mother was on the point of being murdered by him. The father, a highly belligerent man, had previously made threats against her, and had rounded off a particularly violent family disturbance by announcing that he was fetching his knife, and then forcing his wife up against the wall in such a position that his daughters, believing her throat was actually being cut, shouted out "Murder" whereupon Rose shot his father in the head. No knife was found. Mr. Justice Lopes charged the jury simply in terms of "reasonable belief", and not surprisingly the jury acquitted. The decision rested on good judicial and doctrinal authority ³⁵ and the same principle is found in subsequent caselaw. ³⁶

Similarly, in the Scottish case of *Owens v H.M.A.* ³⁷ the Court found that the trial judge had erred fatally in charging the jury only in terms of reasonable belief, and that if the accused was completely wrong in thinking that his opponent was armed with a knife when he killed him, there could be no finding of self-defence. As Lord Justice-General Normand, delivering judgement, put it: *"Grounds for such belief may exist though they are founded on a genuine mistake of fact."* ³⁸ All the same, it is submitted that the trial judge's error ³⁹ was not without foundation in the authorities, and, given the confusion of the latter, it is no surprise that Scotland had waited almost until the Second World War before receiving reported clarification of the position on putative private defence. ⁴⁰

In France, a tragic instance of putative defence is found in the decision of the *Chambre criminelle de la Cour de cassation* of

14 février 1957, ⁴¹ where, during the Algerian war, Piquet had shot dead his neighbour (with whom he was on excellent terms) in the mistaken belief that he was about to shoot Piquet's son. The *attendus* of the decision rejecting the appeal by the *parties civiles* show up well both the principle of putative defence, and the court's willingness to enter into the accused's mind, yet all within a framework again of objectively recognisable factors which could reasonably have led to such an error:

"Attendu...que Piquet a cru avec la plus entière bonne foi à l'imminence d'un danger pouvant être mortel pour son fils; que chargé dans une période d'insécurité, de tension et de peur, par la police d'Azemour, de rechercher et même d'appréhender un malfaiteur, les circonstances furent telles que, voyant celui qu'il prenait pour un malfaiteur, brandir dans la direction de son fils un pistolet automatique de fort calibre, il tira instinctivement sur lui un coup de feu pour le devancer dans son attaque."

Likewise the cases of T.C. Lyon 16 juillet 1948 (G. c D.) ⁴² and Cr 2 octobre 1979 (Benghenissa), ⁴³ both of which involved police officers. In the former, D was searching a suspect (G) after a chase. As he did so, G inexplicably dropped his right arm and moved it towards his pocket, whereupon D shot and wounded him with his drawn pistol, believing he was going for a concealed weapon. The Court stressed that the retrospective determination that D had not objectively been in such danger was by no means fatal, stating that *"...il faut mais il suffit que le prévenu ait pu légitimement se croire en danger..."* ⁴⁴. In the latter, a chase ended in violent fashion when Marchaudon, a police brigadier, shot dead an escaping arrestee who came to a sudden halt and swung round violently with his arm outstretched under his jacket. Despite the fact that he had had no weapon, the *Chambre d'accusation de Paris* rendered an *arrêt de non-lieu*, confirming the investigating magistrate's decision to halt proceedings on grounds of private defence, and the appeal was declared inadmissible. Both decisions again reveal most clearly the quasi-objective 'circumstantial' approach in their judicial analysis, ⁴⁵ showing the double-edged nature of the control, well described by Doyen Légal: *"Ils prendront finalement en considération la*

situation non point telle qu'elle était, mais telle que pouvait légitimement se l'imaginer le prévenu." ⁴⁶

Error - A Clarification

But at this juncture it is necessary to make one clarification, essential to any analysis of private defence, but which is arguably missed or ignored by the majority of writers. For in such cases, what is at issue is *not* in fact private defence at all - rather it is the defence of error of fact.

Consider the following two examples. If X kills or injures Y who is pointing a gun and is about to shoot him, then he is *justified*. But if, on the other hand, he does so under a reasonable misapprehension that these are the facts (in other words, if he acts under a reasonable error of fact), he is surely merely *excused*. Unlike the universal objectivity of self-defence, the error of fact is actor-specific, and detracts in no way from the unlawful nature of his act. For it to be otherwise would mean depriving Y in the latter example of his right of private defence against the aggression of X who, despite his error, still acts *unlawfully*. One cannot, it is submitted, have two justifications colliding head on with each other. X would merit acquittal in both cases, but the underlying reason in each situation would be entirely different and his good faith, his error in no way affects Y's right in the second example to react defensively ⁴⁷.

It is submitted therefore that the frequent references in Anglo-Scots sources to the effect that one is in such situations "entitled", ⁴⁸ and *a fortiori*, "justified" ⁴⁹ are wrong. In France the same error is found in many sources ⁵⁰, but given that the *Code pénal* made no room for a defence of error of fact, leaving it for the judges both to create it and offer it shelter where they could, it is no surprise that they chose Article 328 in the case of putative defence; and references in caselaw to individuals acting in "*légitime défense*" ⁵¹ are more easily forgiven, though, juridically speaking, equally incorrect.

Another tragic fatality in France demonstrates the point. In the early hours of New Year's Day 1981 the *gendarmerie* of Luxeuil was informed that

two intruders, apparently armed, were attempting to break into a pharmacy in a nearby village. Called to the scene, Sergeant-Major N, ⁵² noticing that a window had been broken, climbed through it with his loaded gun at the ready and found himself confronted in the darkness by the silhouette of a man holding an object in his hand, who then threatened him. N fired one shot, which provoked an exchange of gunfire. Subsequent inspection revealed that his assailant, who lay fatally wounded, was none other than the owner of the pharmacy who had mistaken him for an intruder. The *Chambre d'accusation de Besançon* rendered an *arrêt de non-lieu* and an appeal by the *parties civiles* was declared inadmissible. ⁵³

For the academic, the case presents a truly fascinating source, for it is complicated by the fact that though the deceased had apparently been the first to actively express a threat ⁵⁴ he was not the first to fire. However, on the assumption that the pharmacist's actions were sufficient to create a reasonable belief in danger, then it is submitted that of the two parties, the *gendarme* was the one who was *justified*. ⁵⁵

What this case shows however, is that the distinction between our "reasonable belief" private defence and reasonable error of fact (putative) private defence is by no means always clear. The source of the difficulty is the fact that one may legitimately react defensively before an attack is consummated or even fully under way, ⁵⁶ and in the above case this creates one of the most intractable "chicken-and-egg" dilemmas for the observer. ⁵⁷ This is particularly so where an attacker uses *some* force but his victim has no means of knowing that he intends going no further and has no weapon etc. ⁵⁸ And in the final analysis it is reasonable to argue that in practical terms, it is wiser, in order to avoid confusing a jury, to speak of "reasonable belief", encompassing both types of situation. As for France, special procedural considerations add further weight to the practice of using A328 as an umbrella for error of fact. ⁵⁹

D. Unreasonable belief private defence

We have seen thus far that instead of adopting a rigorously objective appreciation of events, the courts do take account of the subjective

pressures which may operate to distort the accused's perception of the situation. This latitude however is delimited by certain objective boundaries. What, then, of the situation where an accused truly believes that he is in danger, yet not only is he incorrect, but his belief, albeit genuinely held, ⁶⁰ is one which no reasonable person in the circumstances would have made, being purely subjective ?

Not surprisingly, the view in France is overwhelmingly against the idea that such a belief may produce an acquittal, as an extension of putative defence. ⁶¹ Interestingly enough, the issue arouses relatively little direct comment among doctrinal writers, but the position of the courts is clear. Representative of this approach is the decision in Cr 21 décembre 1954 (Trombino) ⁶². An altercation had arisen in a café between T and K, after which K left the scene, only to return shortly after, both hands in the pockets of his overcoat. They both went outside, at which point T shot and wounded K. It was subsequently found that K had in his coat pocket a Beretta 7.65 pistol, with a round engaged in the chamber, and a knife was found on the ground in close proximity to his hand. However, this did not stop either the lower court or the *Cour de cassation* from rejecting his plea of self-defence, the latter declaring tellingly that *"...si Trombino a pu céder à la crainte d'une agression il n'existe aucun fait positif l'autorisant à invoquer la légitime défense."* (emphasis added). ⁶³

Similarly in the well-known decision of Cr 7 décembre 1971 (Pesleux) ⁶⁴ it was held that a mere threatening attitude as such on the part of the victim did not furnish a defence to P who, while out on a stroll with his young child, had punched in the face the irate owner of the wood into which they had trespassed. ⁶⁵ Both cases are perfectly in line with the quasi-objective judicial appreciation of private defence outlined above. ⁶⁶

But what of English law ? There can be no doubt that the overwhelming majority of judicial dicta on the matter up until very recently required a reasonable belief in the circumstances giving rise to private defence ⁶⁷ and this was affirmed directly in 1980, when the Divisional Court in Albert v Lavin ⁶⁸ held, after detailed examination of the authorities, that a plea of private defence (strictly speaking, putative defence) could not avail the

accused who had, during a disturbance in a bus queue, assaulted a plain-clothes policeman who intervened to restrain him, the accused acting in the "unreasonable" belief that his opponent was not in fact an officer of the law. Now, while the decision was arrived at with manifest reluctance, "9 it is submitted that it was perfectly in line with prior authority on the matter. 70

However, within two years manifest reluctance had developed into positive hostility, and encouraged by an impressive, powerful and incisive academic assault upon the reasonableness requirement, a differently composed Court 71 felt confident enough to take the decision that their brethren in Lavin had felt compelled to leave to Parliament.

R v Williams

The case was R v Williams 72 and the facts were as follows: one M saw a black youth rob a woman in the street and caught him, apparently intending to take him to the police, but the youth broke away and fled, only to be caught again. Meanwhile W, another black, who had witnessed only the latter half of the scenario from a passing bus, alighted and intervened. It seems that M told him that he was a police officer, which was untrue, and when no warrant card was forthcoming W struck him in the face. It was accepted that none of the parties was known to each other before the incident.

W was convicted of assault occasioning actual bodily harm and appealed, claiming, *inter alia*, that the recorder had erred in directing the jury solely in terms of reasonable belief, against defence submissions. In what must rank as a watershed decision in the law of private defence, the Divisional Court upheld his appeal, on two separate grounds, the second of which concerns us for present purposes, and which is neatly described by Lord Chief Justice Lane in delivering the judgement of the Court, who said:

"The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all." If the belief was in fact held, its unreasonableness, so far as guilt or

innocence is concerned, is neither here nor there. It is irrelevant." 73

(Emphasis added)

The Court, in brief, distinguished between reasonableness as a test, and reasonableness as a standard, opting for the former. Thus the fact that the accused's belief could be classed as a reasonable error was an *indicator* which the triers of fact could use to decide whether the accused did in fact believe he had to defend himself. But it was nothing more. Naturally, the fact that it might be seen as unreasonable would often lead the jury to decide that the alleged belief was in fact not held at all, as the Court itself admitted, 74 but this did not affect the principle - as Mr. Williams himself found to his benefit.

But why exactly was it irrelevant ? Had not Albert v Lavin 75 decided that the law demanded reasonableness ? This was the hurdle which the Court faced and in negotiating it, their Lordships expressly disapproved Albert v Lavin in its statement of the law, favouring the later decision in R v Kimber 76 in its criticism of that case.

In essence, the Court felt that the case fell to be decided according to the principles of D.P.P. v Morgan. 77 There, one recalls, the House of Lords held by a majority that where an accused who was charged with rape had entertained the belief, albeit unreasonable, that his victim was consenting to the act, then he could not properly be convicted of the offence - here too, the question of reasonableness as such was irrelevant. Morgan has, indeed, been the major flagship of those arguing in support of unreasonableness, and it has to be said that the decision in Gladstone Williams 78 accords with the prevailing sentiments in academic circles, which have keenly awaited just such a judgement.

Several arguments have been forwarded by those favouring the subjectivist test, including the unfairness to an accused of holding him to such a standard when he acted in good faith, and in the heat of the moment; 79 the alleged anomalies that (would) arise in both homicide and non-homicide cases by the imposition of reasonableness, 80 the relatively

limited scope of a plea of unreasonable belief, with the consequently small minority of individuals to whom it might apply, ⁸¹ and most importantly the principle enunciated in Morgan. And, having already been followed in at least one recent appeal case, ⁸² there are signs that the decision is set to carve its niche in the English law of private defence.

Critique

Be this as it may, the writer with respect cannot share the views of the many eminent commentators who support subjectivism, adopting the majority stance on the matter. ⁸³ Those factors leading one to such a conclusion are both ones of principle and of policy.

Firstly, it was clear from dicta in Morgan that the decision was confined to those issues relating to the *definitional elements of an offence*, ⁸⁴ and it is submitted that in doing so the Divisional Court in Williams not only "moved the goalposts" juridically speaking, but erred in its conclusions. ⁸⁵

In essence the Williams Court brought private defence under the Morgan principle by deciding that this plea went to a definitional element of the offence, rather than an aspect of defence (which Morgan had left untouched). With this the present writer cannot agree; indeed dicta in Morgan itself confute this ⁸⁶ and it is submitted that the following words of Hodgson, J. in Albert v Lavin reflect the true position:

"It does not seem to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence the word "unlawful" is surely tautologous and can add nothing to its essential ingredients." ⁸⁷

It must be a tautology, for homicide is of course *prima facie* unlawful, and the objectionable implication in declaring otherwise is that somehow the act of killing has an inherent air of propriety about it. The intention is not to kill unlawfully (e.g. not in self-defence) - the intention is to kill

tout court, ** and it is the law which sees to whether it is lawful or not. **

These words were, however, specifically disapproved in Gladstone Williams, 30 thus implying that the absence of a belief in the need for action in private defence was an inherent element in the offence, yet it is submitted that even adopting such a view, the subjectivists fall into an inherent circularity, trapped by the very terminology which they employ. For to speak of unlawful killing and so on regarding the definition of an offence implies that there are two classes of killing - one lawful, one unlawful. "What then, is 'unlawful' ?", one may ask. The answer, clearly, is murder, manslaughter and so on. In that case, the only answer to the question "What then is 'lawful' killing etc. ?" is surely "that committed in, for example, private defence". Thus whichever way one looks at it, the issue of private defence is clearly separate from and external to the classical definitional elements of the offence.

Secondly, it is difficult to accept Professor Williams's statement, regarding negligence, that "Murder requires an intent to kill (or to inflict grievous bodily harm); so it is not murder to shoot and kill another by negligence, however gross." For firstly, it fails to meet the point. Is Professor Williams suggesting no person killing in private defence intends to kill ? This must be wrong. The error is surely to confuse the case of our accused who acts under an unreasonable apprehension (intention - re defence), and one who, say, while cleaning his loaded gun mishandles it in such a way that it discharges at the person facing him (negligence - no intention - re offence).

As a third point, one may consider the serious danger of feigning on the part of the accused. In Great Britain especially, the procedural rules are not unfavourable to an accused who pleads private defence, and the task of a jury would be made even more burdensome, in a field where the extreme difficulty in many instances of establishing exactly the circumstances of a given altercation already results in an abusive recourse to the plea by many accused. 31

Fourthly - and related to this last point - is the consequent deterrent effect that the retention of reasonableness would have, both on the defendant, in sanctioning what is by definition a deplorable lack of care in his actions, and also on those who would be tempted to act "under the colour of necessity" taking advantage of a further relaxation of the rules of private defence.

Fifthly, the decision would surely have dire procedural consequences in law. For, given the present state of the law, a trial judge would arguably have to charge a jury by virtue of the mere fact that an accused had claimed unreasonable belief, thus complicating even further the rôle of both judge and jury, such that we would be venturing dangerously close to requiring judges to charge on impossible defences.

Sixthly, such a move would, it is submitted, represent a regrettable advance in the current trend toward subjectivism in the criminal law, the principle of which must frequently merit approval, but which in some of its practical manifestations is arguably leading to the neglect of the importance of *mitigation*. One has surely to avoid the temptation to see in every factor which militates against the ascription of full moral guilt to an accused, a full justification or excuse, waiting to reveal itself in its true colours, if only the judiciary will let it. Indeed, the principle that once the opening criteria for private defence are satisfied, then the person attacked *must* enjoy wide freedom of action, ⁹² surely demands proper recognition of the interests of the State in 'regulating' - for want of a better word - the case in which the plea is accepted. This latter point cannot be too highly stressed. Public policy in an especially difficult area must not be neglected, and one should be careful not to let sympathy for an accused and realisation of his plight entail approval of the 'deregulation' of the opening rules of private defence.

A seventh objection is that the result would have totally unacceptable consequences in relation to intoxication. A drunken mistake is surely entirely unreasonable - yet on the principle of Williams an accused who was charged with either murder or assault would merit acquittal if the jury thought it possible that he had acted while believing, in his intoxicated state, that his victim was attacking him. It is surely unconscionable that

accused persons should walk free in such cases. It is true that there are instances of judges charging juries to this effect, yet this is hard to reconcile with the overwhelming dicta demanding reasonableness, ⁹³ and given especially the apparent absence of direct authority, it is submitted that such directions do not represent good law. One cannot, however, exclude the possibility that the courts would, faced with just such a case, have recourse to considerations of public policy to defeat such a plea.

It has to be said finally, and perhaps most revealingly, that Gladstone Williams is itself a poor champion for the subjectivist school. Consider the facts. We had an incident in central London, a metropolis hardly reputed for its excellent race relations; a black youth was, so it seemed to the appellant, being attacked by a white; the appellant had only seen the later stages of the first scenario; ⁹⁴ in the very words of the court *"The youth was struggling and calling for help at this time, and no-one disputed that fact."*; ⁹⁵ the 'attacker' sought to justify his actions by claiming to be a policeman, yet he obviously could not and did not produce evidence of this; and none of the parties was known to each other. All these are taken from the judgement, and it is submitted that there was strong evidence that what had occurred was nothing more than a reasonable error of fact and that the case could have been decided simply along the lines of the 'circumstantial' approach outlined above.

And it remains arguably true that the case for subjectivism has yet to be clearly made out, and that its proponents seek approval of a doctrine which as yet remains to be fully defined. Certainly if Williams is anything to go by, it is difficult to see exactly what is meant by an "unreasonable belief". The difference between the alleged subjectivists and the opinion of the present writer is apparently not as great as one might at first believe, and cases such as Williams surely highlight the fact that the subjectivists have yet to identify adequately, let alone prove, their case, and provide an answer to the simple question *"What exactly is meant by 'unreasonable belief'?"* ⁹⁶

In light of the above, it is submitted that Williams was wrong, both in descriptive terms, as going against the weight of authority ⁹⁷ and especially in light of contrary dicta from the House of Lords in such cases

as Morgan; and in normative terms, for, on balance, both principle and policy militate against acquittal in such cases. One in no way wishes to suggest that subjectivism may reasonably be dismissed out of hand - but on reflection, the writer feels unable to join with the prevailing view supporting the principle of Williams, and one cannot but keenly await clarification of this matter from the House of Lords.

Rather, such considerations, relating as they do to a matter of 'defence' should, arguably, operate in mitigation of sentence, where the courts can of course exercise very wide discretion. Yet this clearly leaves a problem in the case of murder, demanding as it does a mandatory penalty. Strictly speaking, a killing committed in the unreasonable apprehension of attack is arguably murder, ⁹⁹ all other things being equal, yet insofar as this precludes discretionary disposal, one may agree with Professors Smith and Hogan ⁹⁹ that this is an "indefensibly savage doctrine" ¹⁰⁰ - the element of good faith surely argues against assimilation with the most callous of killers. There is some authority supporting the view that an unreasonable mistake should result in a manslaughter verdict, ¹⁰¹ but in light of the traditional requirement of reasonableness for an acquittal, their juridical foundation must surely remain open to question, and therefore it is submitted that a statutory provision allowing for a verdict of manslaughter in such circumstances is now required as a priority.

So far as Scots law is concerned, there seems little doubt that an unreasonable belief - whatever that means, precisely - could not in itself found an acquittal. The authorities are explicit in their requirement of reasonableness and in their hostility towards the issue of unreasonable belief. ¹⁰² True, Scotland has had its own Morgan, ¹⁰³ in which the High Court of Justiciary reached the same conclusion as its English brethren in the House of Lords, but the writer has attempted to demonstrate that Morgan as such does not bear upon the issue of private defence. It is submitted that whatever the activities of the Divisional court in England, the Scottish judiciary are unlikely - and rightly so - to engage in a similar flirtation with subjectivism north of the Border. There does seem to be authority for the view that a verdict of culpable homicide is open in cases of homicide, ¹⁰⁴ but one may not be sure that it would be followed today.

Having examined the criteria relating to the accused's belief in the existence of attack, we may now proceed to consider in more concrete terms the rules relating to the opening conditions of private defence.

2. The Actuality of the Attack

The requirement of the actuality of the attack is a logical expression of the former, and finds explicit reference in Articles 328 and 329 of the French *Code Pénal*. At its simplest, it states the obvious - that the right of defence depends upon the existence of attack. Crudely put, one may not defend before an aggression has occurred, nor may one do so once it is over. However, it is by no means always easy to determine precisely at what point an attack begins and ends, as we shall see here and throughout the present study. Given this, and the infinite variety of situations involving pleas of private defence, the realisation that one may only identify principles which are then applied to different facts makes it more realistic to describe private defence negatively, in terms of its boundaries.

A. Classical Private Defence

In some situations the attack may well be fully under way, and the use of some force will immediately bring it to a halt, bringing the altercation on both sides to an end. A good example is found in Cr 9 juin 1976 (Andreu)¹⁰⁸. There Andreu, who was on bad terms with Cerciat, entered the latter's courtyard in a clearly aggressive mood, and threw himself upon C. Striking him upon the head with such force that he fell to the ground, he continued to beat him until C managed to seize hold of a stake and, struggling to his feet, struck his attacker, who there and then made off. A textbook case of private defence, which the court duly recognised.

Now, underlying the finding of private defence there is one crucial assumption, namely that the force was employed in *prevention*. In other

words, there is the implication that violence had to be used to forestall further attack. Strictly speaking, therefore, rather than say that the defender uses force to put an end to the attack, it is perhaps preferable to say that the defence is in order to prevent consummation of the attack.

The logical consequence then is that Cerciati was cleared of the charge because he could reasonably believe further violence was likely - one cannot defend against past violence and therefore the principle of preventive force would not, as such, have applied against the very injuries he did receive. This concept of anticipatory action is well articulated in all three jurisdictions.

B. The Anterior Limits to Private Defence

Quite clearly it is evidentially favourable for an accused to be able to demonstrate ¹⁰⁶ that, like Cerciati, he was already being beaten when he struck in his defence. But the law does not demand subordination of one's physical integrity to the niceties of procedural convenience. And so it suffices, to create a reasonable belief, that there was an impending attack - in other words, that it was *imminent*. One is not required to await the first blow before striking in self-defence. ¹⁰⁷

This notion that not only actual attack but an impending aggression may suffice is well established among the authorities, recurring time and again throughout the caselaw in all three jurisdictions, and applies whether the charge is one of homicide or non-homicidal violence ¹⁰⁸. Obviously there can be no necessity for the use of force if there is no impending attack, ¹⁰⁹ and we therefore see the close connection between the requirement of "reasonable belief" examined above, and that of imminence - the law will generally only recognise the need for defensive action where the threat has sufficiently 'crystallised' and its execution is so near that not only is the existence of an attack made out but the victim's chances of avoiding combat are greatly reduced. In this requirement, the law protects *inter alia* the interests of those who, while perhaps harbouring evil in their minds, have not - yet - demonstrated their willingness to translate this

into actual violence; and it upholds the interests of the State in minimising violence between individuals.

A prime example of imminence then is to be found in the case of *R v Rose*, ¹¹⁰ examined above, where the son shot with the intention of saving his mother only when it appeared that his father was on the very point of cutting her throat. Similarly, the case of *Cr 14 janvier 1976 (Fatieri)* ¹¹¹. There, an altercation had arisen between F and the deceased, from which F fled. He was, however, chased by the latter, who was armed with a knife. When he was on the point of being caught by him, he turned round and slit his opponent's throat with a machete, virtually decapitating him. The *Chambre d'accusation de Basse-Terre* found self-defence, and the *Cour de cassation* declared the *pourvoi* inadmissible.

It will be realised, further, that the issue of imminence may arise at different levels, and be present at one, but not the other. Thus one may face imminent danger of a few punches, but this will not necessarily signify the imminent threat of a homicidal attack. From this it follows firstly, that one should be wary of compartmentalising the issue of imminence, just as with the rules of private defence in general, and secondly that the question of imminence will, as we shall see in the following chapters, determine a differentiated response by the defender, dependent upon the particular gravity of the attack. ¹¹²

The virtual back-to-the-wall case is indeed the paradigm case of imminence, and is the very stuff of the classical illustrations of private defence, but equally, the mere fact that an attacker made an attempt to grab one's weapon ¹¹³ would constitute an imminent danger. What is important then, generally, is the presence of some *fait concret* which can be satisfactorily related in law to the particular defensive action. Thus, as we saw, a sudden and ambiguous movement of the hand towards a pocket may be also legitimately viewed as a threat. But a mere belligerent attitude will generally not as such suffice if it does not portend an *immediate* threat ¹¹⁴. In *Cr 24 novembre 1899 (Chesnay c M.P.)*, ¹¹⁵ one C, having vainly demanded reparation from Chesnay over a newspaper article which he considered defamatory, turned up at his office in the company of two friends. On being presented to Chesnay, he declared to him: "*Je suis*

Monsieur Chanjou, c'est vous Monsieur qui vous permettez d'insérer dans votre feuille de chou...". He never finished the phrase, for on hearing these words, Chesnay rushed at him, beat him in the face and hurled him to the ground. The lower court rightly rejected Chesnay's plea of private defence, pointing out, as the *Cour de cassation* remarked, that he had struck "*avant même que Canjou eût levé la main ou fait le moindre geste de menaces.*" ¹¹⁶

While clearly the issue of imminence must essentially be one of fact, dependent on the circumstances of each case, there can be no doubt that the principle articulated in this case equally reflects that of both English and Scots law.

Preventive Defence

It comes then as no surprise that there is unanimous condemnation of action taken where the threat is but distant and ill-defined. In *Crawford v H.M.A.* ¹¹⁷ Lord Keith ¹¹⁸ rightly condemned the idea that a person could seek out and kill another in order to remove a possible, and perhaps unfounded, danger to himself, and this view expresses authority north and south of the Border. ¹¹⁹ As East put it:

"... a bare fear...unaccompanied with any overt act, indicative of such an intention; will not warrant him in killing that other by way of prevention; there must be actual danger at the time." ¹²⁰

This undoubtedly expresses the law relating to non-homicidal violence also. While the rules of private defence may in certain respects have relaxed somewhat in modern times, ¹²¹ the law remains instinctively hostile to the courting of violence, and the notion here that one may not only court but initiate it without good cause runs against the traditional principles of the law, and there is overwhelming rejection among French authorities of what one might call the principle of preventive defence. ¹²² Faced with a threat which is vague, general or prospective in nature then, an accused should either have recourse to the courts, or seek police protection. ¹²³ There can

in principle be no necessity to use defensive force when there is no attack against which to react, and the social chaos which would ensue were there to be no such constraint is enough to demonstrate the unworthiness of any other proposition - Cicero's words remain ever-relevant: "*Quis hoc statuit unquam, aut cui concedi sine summo omnium periculo potest, ut eum potuit occidere a quo metuisse se dicat, ne ipse posterius occideretur ?*" ¹²⁴

However, it is possible to imagine circumstances where one might use force, even serious force, even before there was any overt attack upon one's person. The most obvious situation is that of hostage-taking. Here there may be no overt act of violence once the kidnapping is completed, but it is submitted that the mere fact of sequestration, particularly where one's captor is armed, justifies the immediate use of homicidal force if necessary, to forestall the possibility of a future assault. ¹²⁵ As Professor Williams pointedly states "there is a distinction between the immediacy of the necessity for acting and the immediacy of the threatened violence." ¹²⁶ and it is submitted that in such circumstances the use of negotiations and other delaying tactics by the authorities may in general be viewed not as a matter of legal duty, but as a privilege accorded the hostage-taker.

Given this, the writer cannot share the view of Lord Diplock in Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975) ¹²⁷. who, *obiter*, rejected the possibility of private defence for a soldier in Northern Ireland prosecuted for shooting a fleeing youth whom he had challenged in the province's 'Bandit Country'. In such circumstances, a member of the security forces surely could reasonably fear that such person might alert nearby terrorists to his presence, in a veritable death-trap where neither the general threat against troops nor the element of surprise operating in favour of the terrorists could be disputed, and the writer fully agrees with the view of Professor Williams that *in such circumstances "it is hard to see why private defence should be excluded."* ¹²⁸

One sees thus that the dividing line between pre-emptive and preventive defence is by no means always clear. No doubt the opportunities to take preventive action would be rare, but it is submitted that it is not as such seconds which count; rather, whether there is a sufficient causal link between the acts of a suspected 'attacker' and a potential threat to the

accused. If this is made out then there seems no reason for rejecting a plea of private defence. ¹²⁹

But while the precipitate use of violence is a major concern which demands relatively tight legal constraints, there is no reason why a person should not, in anticipation of an attack, prepare the means of his defence. It is only good sense to do so, and society's interest in the prevention of crime militates in favour of such action. Hence, in all three jurisdictions it is quite permitted to pre-arm oneself in the face of a suspected danger, and this will apply well beyond the limits placed upon the use of defensive force. ¹³⁰ In Attorney General's Reference (No.2 of 1983), ¹³¹ the Court of Appeal specifically rejected the proposition that private defence only applied to spontaneous and not anticipatory acts. ¹³² Indeed, the casebooks in all three countries would be sorely depleted of decisions on private defence had not the accused in question - most visibly in France - taken the precaution of arming themselves before confronting their adversaries, for instead of defendants, they would appear as victims before the courts. As we noted above, it is no doubt evidentially beneficial to an accused to show that he only struck with a weapon which happened to be to hand, but it would be an unjust law which posited one's defensive rights simply upon the factor of chance.

Thus, not only may one pre-arm oneself, but equally one might, at least in England, threaten force where the actual use of force might be premature. ¹³³ Indeed, it is surely reasonable to permit this, for such action might in fact 'nip in the bud' any threat which, undeterred, could otherwise develop into a full attack. One may also, in certain circumstances, set automatic devices ready for operation at some indeterminate future time. These will be the subject of fuller discussion later in this study, ¹³⁴ but suffice to say that there is in the writer's opinion no reason why their use should not in principle be legitimate in certain circumstances, for one must not confuse their setting, with their operation.

But just as the law controls the point before which defensive force may not lawfully begin, so too is there in law a time beyond which one may not

legitimately employ force in supposed private defence. And so we may turn to examine the factors considered in determining both at what point violence may not rightly be used against an aggressor *tout court*, and also when action which began in legitimate private defence subsequently becomes unlawful.

D. The Posterior Limits to Private Defence

As with the anterior limits to private defence, those covering the other end of the spectrum simply articulate basic common sense. Once an attack is over, there can be, by definition, no aggressor. There is no longer any necessity for defence, since the one is dependent upon the other, and if we recall that the essential basis of private defence is that of prevention (undertaken in the absence of State protection) then it is clear that violence inflicted 'after the fact' cannot be justified in terms of private defence. This view is firmly based in the authorities of all three jurisdictions. ¹³⁵

In the most blatant cases, such action is nothing less than outright revenge, which holds no honourable place within a system of criminal law which seeks to promote respect for life and bodily integrity. Unlike private defence, it is a unilateral act, not a bilateral 'exchange'; unlike private defence it is backward-looking, not prospective; it is not self-protective, but essentially punitive and retributive, satisfying a psycho-physiological urge to neutralise, or exorcise the *memory* of some grievance, which has stained one's 'honour'. While acts of defence are often committed in the 'heat of the moment', revenge attacks - for that is what they are - may often be characterised by a certain interval, ¹³⁶ and the cool, calm preparation of their perpetrators; and rather than protect bodily integrity or some other highly valued commodity, revenge seeks to restore lost honour and satisfy feelings of rage and anger. ¹³⁷

This is not to say though, that the interval between the attack and act of vengeance need always be very great. Again one may say that it is not a simple act of counting seconds. In *R v Driscoll*, ¹³⁸ the facts were that S and D had had an argument during which S, on being called a liar, clenched

his fist with a view to punching D. However, D's wife interposed and pushed him down, whereupon D assaulted him, wounding him in the face and neck. Coleridge, J. expressly warned the jury not to commit the popular error of assuming a right to avenge oneself, and they duly convicted. For his indiscretion, Driscoll was transported for fifteen years. '39

At best, an accused might benefit from a plea of provocation, for the law does make allowances for the reactions of even the most reasonable of men (or women) who have been the subject of an unlawful attack upon their person. True, there are features linking private defence with provocation - both involve an 'attack' of some sort and a precipitated response; the law requires in both a certain measure between the attack/provocation and the reply; there may be third party provocation, '40 just as third party private defence '41; and there is a history of confusion between the two pleas among both the courts and academic writers, most notably in Scotland. '42 But rather than view provocation as a sort of '*légitime défense imparfaite*' '43, the writer would prefer to stress the differences between them, '44 and if anything, provocation should arguably be viewed as closer to revenge than anything else, carrying as it does many of the characteristics of the latter. Provocation is an excuse, a qualified excuse, and never a justification.

Given this separation between private defence and provocation, then, one may question the use of the word 'retaliation' by Lord Keith in *H.M.A. v Doherty* '45 to describe the act of defence, as too connote of the retrospective act committed in either provocation or revenge. While not entirely free of the same criticism, it is submitted that the term 'riposte' might be more appropriate.

Practical Considerations - Caselaw

How then may the triers of fact determine just when the cut-off point for private defence occurred? There are several indicating factors. Generally speaking, there will often be no longer any need for defence where one's attacker is fleeing, for often he will in such circumstances be unable to present any threat. "(T)his is revenge and not defence" Stephen tells

us ¹⁴⁶, while Burnett states that a killing in such circumstances might well amount to murder ¹⁴⁷.

In Priestnall v Cornish ¹⁴⁸ the defendant was involved in an incident and subsequent chase involving his car and another containing three men, which culminated in both vehicles coming to a halt, the defendant's car in front. Both drivers got out, with the defendant holding a 'Krooklock' in his hand, at the sight of which the other retreated into his car, only to be struck several times by the accused who also smashed the car's windscreen. The justices upheld his claim of self-defence and found him not guilty of, *inter alia*, assault occasioning actual bodily harm, but the prosecutor's appeal to the Divisional Court was allowed, in a decision which it seems merits approval. ¹⁴⁹

For France, one may cite with approval the decision in Cr 2 février 1985 (Patarin) ¹⁵⁰. There, the victim, L, had gone with two friends to P's house, to 'see what P had to say' about the killing of L's cat. L struck him, to which P replied by firing his shotgun and wounding his attacker. While finding provocation made out, the lower court and the *Cour d'appel de Riom* rejected his plea of private defence, pointing out that when the shot was fired, his victim had turned round and was going back to his car. Similarly with the decision of Cr 16 juin 1982 (B...) ¹⁵¹. There had been some trouble at a dance-hall at which the accused, a barman, worked, when a group of youths who had been refused entry, tried to gain access by an emergency exit. The accused aimed his .22 rifle at them with his finger on the trigger, which prompted the group to retreat by the same opening, yet he nevertheless fired as the door was closing. He was convicted of wounding. In neither of the above cases did the *Cour de cassation* find any grounds for interfering with the decisions.

Likewise one may safely argue that in most cases one is hard-pressed to plead successfully private defence where one stabbed one's aggressor in the back as he fled on sight of the weapon ¹⁵², where one chased after one's aggressor, tripping him up and injuring him ¹⁵³ or shot an adversary as he made off with his back to one. ¹⁵⁴

But it is perhaps precisely this issue of firearms offences that best demonstrates how the scope, nature and interpretation of private defence must be to a great extent jurisdictionally specific. Rules and situations inappropriate - or at least uncommon - to one may well be more easily accepted in another, where social factors produce a climate more conducive to their application. The involvement of firearms in crime in France, due partly to less stringent legislation, goes far beyond the experience of this country. ¹⁵⁵ And this is of no small import to the law of private defence - for, while one may perhaps legitimately claim that an attack upon a retreating person would be justified in "exceptional circumstances" ¹⁵⁶ when speaking of Britain, it is by no means clear that the same could be said of France, although such instances would undoubtedly be rare. Two cases illustrate this point.

In Bourges 15 novembre 1905 (Dupont et Marquis de la Roche), ¹⁵⁷ two poachers were surprised by gamekeepers on a private estate and immediately made off together. Moments later, one of them turned round and fired at the keepers. In the picturesque words of the judgement, "*Dupont, entendant les plombs siffler à ses oreilles, riposta immédiatement*", shooting and injuring one of them in the leg. The court found self-defence made out, taking care to point out that in such circumstances the accused could legitimately fear a renewed attack against him.

It is submitted that no attacker - fleeing or otherwise - can be considered as fully 'safe' so long as he or she still remains in possession of a firearm, and therefore instances of injury inflicted against such an individual when in flight must demand particular scrutiny by the justices or jury before the plea of private defence is excluded. But in addition to demonstrating the danger of attackers who try to cover their flight, the case is important for its recognition of the fact that it is often very difficult to determine precisely when an attack has ended, for one act of violence may legitimately give rise to fears of another, which brings us back to the question of imminence. ¹⁵⁸ As mentioned earlier, the issue of flight cannot preclude the possibility of private defence where there is a risk that the individual is likely to seek reinforcements or in some other way remain a major and identifiable threat. ¹⁵⁹

One way of removing the threat of course is for the victim to beat a hasty retreat, and in such instances one might legitimately exclude the operation of private defence where, having 'had his chance', the accused returned to the scene to confront his opponent, thus reviving the incident. But clearly, while taking the time to go away and fetch one's weapon will often mean bringing an altercation to an end, ¹⁶⁰ this will not always be so, for, particularly in the case of defence of third parties, there may still be a continuing and ever-present threat. ¹⁶¹

Likewise, one may recognise in principle that when the attacker has been secured, one may no longer legitimately employ force against him in supposed private defence. ¹⁶² Such action beyond the necessities of the occasion in effect transforms the erstwhile victim into an aggressor himself. ¹⁶³ But it hardly needs stating that it will not always be obvious to the defender, especially in the heat of the moment, just when one may say that the aggressor has been rendered harmless. Hence in *R v Carman Deana*, ¹⁶⁴ the Court of Criminal Appeal reluctantly set free the appellant, after unequivocally rejecting instructions given to the jury that no more than warding off a blow could be attempted by someone who was attacked, this being a material misdirection. ¹⁶⁵

The second case is particularly interesting, illustrating as it does both the above points. During violence which marred the opening of the municipal elections campaign in the small town of Puteaux in France on the night of the 26-27th February 1971, one D apparently shot and wounded two political opponents. He then opened fire on a taxi being driven by S whereupon S drove straight at him, chased him along the pavement and knocked him down. The *Chambre d'accusation de la Cour d'appel de Paris* confirmed an *ordonnance de non-lieu* by the investigating magistrate, closing the case, both decisions being based upon Article 328 private defence, and the *Cour de cassation* in its decision of 13 décembre 1973 ¹⁶⁶ declared D's *pourvoi* inadmissible.

The writer fully approves of the judgement. The victim had come under a very serious attack, and could legitimately fear further violence until his aggressor was totally neutralised. It is clear that only by keeping up the pressure on his attacker, and preventing him from regaining the initiative

could he ensure his own safety, and this he did by choosing perhaps the only course of action open to him, using an obvious, if unconventional, weapon. Two things in particular emerge from the judgement. Firstly, we have confirmation that there can be no such thing as a strict rule against a fleeing attacker. And crucially, the second aspect, linked with this first one, is that the accused was entitled to use force against his attacker until he had fully secured his safety. This latter aspect cannot be stressed too highly. While public policy demands that there be a relatively tight constraint upon the opening conditions of private defence, it is submitted that once an attack is actually declared or 'recognised', the law must allow a fairly large degree of latitude to the defender in his attempts to ensure his own safety. Looking at the case, it is difficult to imagine a more perfect illustration of Hume's words, where, speaking of defence against a felon, he says:

"Nay, it may even be maintained, that though the assailant give back on the resistance, yet still the innocent party is not for this obliged immediately to desist, (since it may be only a feigned retreat, or to call his associates); and that he may pursue nevertheless, and use his weapon, until he be completely out of danger." 167

A further illustration may be used. Imagine X, a quiet youth of slight build and little experience in physical violence who finds himself accosted by an adult male of powerful physique who is intent on giving him a beating. Both are in an underground carriage, and X has therefore no means of avoiding conflict. Two things are clear to the writer. First, X has every right to attack first, in order to pre-empt his aggressor; indeed his best chance probably lies in this course of action. And secondly, his response must be effective if he is not to come off the worse of the two. In such circumstances, one has to hit hard, not just to immobilise one's attacker, but also to ensure that he remains in this state until one is in a position to either disengage or seek assistance. The consequences for our hapless weakling were he not do so clearly demand this, for the right of private defence is only a right so far as one is permitted the means to exercise it to its full extent. Of practical importance, then, is that in situations of close hand-to-hand fighting, the fact that the wound was inflicted in the

attacker's back can in some situations rightly be admitted without prejudice to the plea. 168

It may be that such words come as uncomfortable to the reader, but they express nothing new. No-one could reasonably deny that one should not kill or injure if there is no danger. That is not the issue. What is being stated is that one must first determine that there is no longer any danger. In essence, one simple, straightforward question remains behind many of the principles enunciated in the law of private defence: was the person injured still an attacker, did he still constitute a real and imminent threat to the accused, or alternatively, could he have reasonably been supposed to pose such a threat? No doubt rules such as that relating to flight and other matters will be the norm, but it should be appreciated that they are in essence merely the crystallised expression of evidential issues, and should in no way be applied as rigid, inflexible ground rules, if justice is to be done in individual cases - a point to which we shall return later.

Mention at this point may be made of the decision in Cr 28 mai 1937 (Sottile c Consello) 169. There, the accused had been attacked by an aggressor armed with a knife, and after a heated struggle, he managed to disarm his attacker, and stabbed him with his own knife. He was convicted of wounding, and the *Cour de cassation* rejected his *pourvoi*.

The writer would, with respect, question the judgement, for its failure to view the affair as a single incident. 170 One has the distinct impression that the Court was influenced by the (understandable) suspicion, which resurfaces from time to time in the case reports, of individuals who wound an unarmed person and then plead the necessity for defence. True, one has to be wary of such pleas, but there is a limit, and from the case reports equally emerges recognition of the fact that in many situations an unarmed person may still present a grave threat. The judgement is all the more questionable when in the very words of the Court: "...ce n'est qu'après lui avoir arraché son couteau et pour se dégager qu'il avait blessé son agresseur...". One may contrast this decision with that of the Lahore High Court in Lal Baksh v Emperor, 171 which concerned an appeal by the Crown against an acquittal on a charge of murder. The facts were that the respondent had come across a man with a reputation for violence, recently

released from prison, and who was indecently importuning L's aunt. The respondent remonstrated with him, and the deceased raised his club in order to strike him, but L snatched it from him and struck him a blow on the head. This the court found to have been committed in self-defence (although it denied such justification for a second blow which was struck to the back once the deceased had been disabled). ¹⁷²

From the above, then, it will be appreciated that the questions of just when one's attacker may be treated as secure, and how much force is permitted in the riposte are inextricably linked. And complicating the equation is the fact that given the psychological disturbance frequently associated with the circumstances of an attack, the individual's assessment of when the need for action comes to an end may not necessarily correlate with objective reality - this we shall examine in more depth when we come to look at the conditions imposed in law upon the defensive act. ¹⁷³

Phased Defence

Equally, it will be seen that not only are there cases where force is simply used too late in the scenario to merit the law's protection, but also force which began as lawful defence may degenerate into illegality, falling foul of one or other of the above guidelines (fleeing attacker, disarmed attacker and so on). While it is examined in detail in the following chapter, relating to the conditions of the act of defence, the principle does merit attention within the present context, particularly where the force was used most blatantly *ex intervallo* against the erstwhile attacker in what one might call 'phased defence'. A clear example has already been seen in the case of Lal Baksh, above, ¹⁷⁴ but once again it is the French case reports which supply us with the most apposite illustrations - of a principle which unquestionably also represents the state of the law in Britain.

In Cr 16 octobre 1979 (Ripault), ¹⁷⁵ two brothers had become involved in an affray with a group of individuals to whom they had had refused entry to their discotheque, by reason of the late hour and their state of drunkenness. The police intervened and detained their attackers, at which point the two brothers made a rush at their former aggressors and laid into

them with clubs and other weapons. Their plea of private defence against charges of wounding were rejected, in judgements which clearly viewed the incident as divided into phases, and the *Cour de cassation* upheld these decisions. Their conviction was particularly apt, for at the scene were the very representatives of the State whose absence it is that underlies the basis of private defence - the police.

More vividly, in Cr 1 février 1972 (Jouot), ¹⁷⁶ the facts were that the accused, an off-duty policeman, was attacked by an individual who punched him in the face then continued to beat him as he lay on the ground. He managed to pull out a revolver, and fired three shots. He was convicted of wounding, apparently on the basis that while the first shot may have been fired in lawful self-defence, the latter two were discharged as his attacker fled. This was not the first time that the courts had been involved in bullet-counting, ¹⁷⁷ but it is submitted that while one may question its application to the facts in some cases, the principle remains good: that one should be penalised for those acts which are committed when there is no longer any reasonable necessity for them, and conversely that one should not be punished for those acts not committed in excess of lawful defence. ¹⁷⁸ And such practice is a necessary means of applying this very principle. As Alison put it:

"In such cases the defence degenerates into an aggression, and the original assailant is entitled to demand punishment for the new assault committed on him after his original attack had been duly chastised." ¹⁷⁹

(Original emphasis)

But we have already seen that *"en cas de réaction contre une attaque déjà passée il n'y a pas automatiquement vengeance"*, ¹⁸⁰ and therefore in the case of a fleeing attacker, particularly, private defence may give way to the use of force in effectuating an arrest or in the execution of public duty. Examination of this vast, complex and uncertain area of the law is far outwith the scope of this thesis, but it is important to appreciate that such powers may on occasions be invoked by private individuals, as with police officers, where private defence fails them.

This was recognised in the French decision of the Cour d'appel de Paris of 6 juillet 1963 (Vve. Polès c Trésor Public) ¹⁸¹. The facts were that during a visit to the *gendarmerie* to complain about charges laid against his son, the deceased became violent, attacking and throwing to the ground one *gendarme*, and wounding another with a knife, before chasing after the first with his weapon in the courtyard. He then made off on his bicycle, but after failing to respond to the statutory injunctions to halt, he was shot dead, by one of two bullets fired by the *gendarmes*. The investigating magistrate issued an *ordonnance de non-lieu*, and the *Cour d'appel*, in what was a civil suit, rejected the claim on the grounds that although private defence was not open, they had acted in a lawful attempt to detain Polès. The *Cour de cassation* rejected the subsequent *pourvoi*. ¹⁸² Similarly, in a decision of the Chambre civile de la Cour de cassation 10 juin 1970 (Mlle. Follis) ¹⁸³ the court rejected a civil claim against a rather spirited woman who, having been sexually attacked, pursued her assailant in a car chase which ended when she managed to force a collision between the two vehicles, before alerting the police, who subsequently arrested him. Her actions were upheld by virtue of Article 73 of the *Code de procédure pénale*, which in the case of the more serious offences, gives private individuals the right to detain those responsible and deliver them up to the police. ¹⁸⁴

Remarkable though is the fact, to which reference has been made, that in France, members of the *Police Nationale* (as opposed to the *Gendarmerie Nationale*) in effect may not use their service weapons other than in private defence. ¹⁸⁵ In the case of Veuve Polès c Trésor Public, ¹⁸⁶ mentioned above, the *gendarmes* had exercised their statutory right ¹⁸⁷ of issuing repeated *sommations* ("Halte ! Gendarmerie !") which, if unsuccessful, then permitted them to use their firearms, even against a fleeing suspect. ¹⁸⁸ Yet had the individuals involved been police officers, they would, according to the general view, have had no justification for their actions, a notion which does appear to have received some judicial expression. ¹⁸⁹

This astonishing view is all the more puzzling given the seemingly arbitrary distinction drawn between members of the *gendarmerie* and *police nationale*; and it is compounded when one considers that as the former work almost entirely in the country, while the latter have authority over

both Paris and the provincial cities and towns, it can hardly be claimed that the police are less likely to encounter situations where the use of proactive, assertive force is necessary. It is submitted that irrespective of the internal authority of departmental regulations, ¹⁹⁰ these cannot claim precedence over the very text of Article 327 of the *Code pénal* which provides an express justification for both homicide and injuries "*ordonnés par la loi et commandés par l'autorité légitime.*" Indeed this very article was also invoked by the *Cour d'appel de Paris* in its decision in the *Polès* case, in addition to the statutory provision applicable exclusively to the *gendarmes*. ¹⁹¹ Tellingly, the *Cour de cassation* made no mention of it in its confirmatory decision, ¹⁹² yet the writer cannot understand the neglect into which the article has apparently fallen in the hands of both judges and academics. It is most vigorously submitted that Article 327 of the *Code pénal* be rehabilitated as soon as possible, and that the artificial and legally dubious distinction between the *gendarmerie* and the *police nationale* should be formally abandoned.

Finally, before proceeding to the next section, mention must be made of one important situation in which the use of force against a fleeing attacker may well often be justified. Where the offence is one of theft, or burglary, then clearly the danger may not be considered over by virtue of the thief's flight - indeed quite the opposite, for it serves to strengthen the danger - not to the person, but to property. What remains a very open issue though, is the precise scope for the use of force in the protection of property, a question which will be discussed in depth later in this study. ¹⁹³

What we have seen then, in the above sections is that certain guiding principles may be applied to assess the particular physical and temporal circumstances in which one may deduce that a situation of lawful private defence has arisen. Given, though, that this interpretation is inextricably linked with the determination of particular issues of fact, it will be appreciated that each case must depend on its own circumstances, and that those guiding principles cannot be viewed as fixed operational rules, insusceptible of derogation. From, then, this fact-based analysis, we may turn to a more evaluative examination of the nature of the attack, in our effort to complete the description of the characteristics of the aggression which give rise to a right in law to the use of defensive force.

3 The Unlawful Nature of the Attack

It is a prerequisite to the classification of defensive force as "lawful", that it be committed against an act which does not receive the protection of the law. For it would be illogical for the law to justify fully the one aggression, and equally sanction opposing violence used in an effort prevent it.

Thus force may not legitimately be used against someone who is arresting one, ¹⁹⁴ nor against, say, one's gaoler or executioner; for, these acts are committed under the authority and protection of the law. Equally, the very act of private defence itself enjoys similar status. It would be nonsense for, say, a homicidal attacker to plead private defence against his intended victim who managed to put up a good defence and who necessarily endangered him in life or limb in doing so. ¹⁹⁵

Now, in the cases hitherto examined where the plea of private defence was made out, the resulting acquittal was based on the fact that the law accorded a protective mantle, by way of justification, for acts which would have been otherwise criminal. And underlying this, was the fact that the defender had been the victim of an attack that itself was punishable under the criminal law. It is against just such action that the forces of the State are deployed, and as we saw, in the absence of such protection, the right to deploy defensive force reverts to the citizen.

However, is there not a problem in some situations ? What if one is attacked by an insane attacker, by a psychotic ? Such individuals are, if sufficient links are found between their incapacity and the alleged offence in question, entitled to an acquittal by reason of their insanity. Does this not then pose problems within the context of private defence ?

The answer must be no. For any impediments to the right of defensive force in such circumstances are purely illusory. Firstly, the fact is that the right of private defence has nothing whatsoever to do with punishment, this function being the sole prerogative of the courts - protective prevention is the issue. Secondly, the fact that the attacker is acquitted

does not in any way affect the criminality of the act. The acquittal is specific to the actor in question - it is an excuse which is internal to the individual and does not apply to the act itself. ¹⁹⁶ In other words we have an *actus reus* but no *mens rea*, but it is submitted that that is all one requires for there to be a *prima facie* right to private defence. ¹⁹⁷ Such a conclusion is surely the only option - could it really be suggested that, had he been armed, the unfortunate Mr. Drummond would nonetheless still have been effectively condemned to execution by McNaghten? Writers on both sides of the Channel are thus unanimous in permitting the use of force in such circumstances. ¹⁹⁸

However their unanimity does not extend to viewing private defence as its foundation. For some French authors prefer to base the use of force upon the plea of necessity ¹⁹⁹. It is a view which the present writer cannot, however, share. Firstly, it sometimes rests on a questionable justice-oriented attitude towards normal private defence, ²⁰⁰ which seems inappropriate to the plea. Secondly, the logical consequence of such a finding that one may thus justify homicide under a plea of necessity is quite unacceptable to the present writer. Thirdly, on a practical footing, the notion inherent in necessity of stricter conditions of application than those required for private defence ²⁰¹ urges rejection; for a moment's thought will show that if anything, there is often more to fear from the possibly frenzied attack of a psychotic who is perhaps less likely to respond as another would to those efforts, violent or otherwise, to forestall him in his attack. In such circumstances, indulgence is, if anything, more appropriate towards the actions of the defender than the attacker, whatever one's compassion for the latter.

It is submitted that if one keeps firmly in mind this analysis of unjust attack then an examination of all similar "difficult cases" shows that any problematic issues are more apparent than real. Thus, if the attacker were to be a child below the age of criminal responsibility, a hypoglycemic, or a person attacking another during a 'night-terror', the fact that they might be acquitted in court for any actions they took, in no way removes the right of private defence. Perhaps in the case of a child, one may demand that the actions of the defender be more strictly controlled than in normal cases - but it is worth pointing out the possible hidden circularity in such

a proposition, for in essence it will often be not so much a case of restricting the defender; rather, by reason of his or her vulnerability, a child may well not actually present a real, imminent and sustained threat in the first place.

Again, if a person were to be attacked by someone acting in the reasonable but mistaken apprehension that one was attacking him, one would still be fully justified in using defensive force. ²⁰² As Lablancherie stated *"L'erreur d'une personne ne peut, en effet, en priver une autre de la garantie de la loi."* ²⁰³ Similarly, the fact that an offence was committed by a person subject to diplomatic immunity cannot efface the reality of the criminal law which accords his victim the right to protect himself against such attack. ²⁰⁴ It is submitted that the words of Pufendorf, written over two centuries ago, remain ever valid in their application to such situations: *"En un mot, pour rendre innocente la Défense de soi-même, il suffit que l'Agresseur n'ait aucun droit de nous attaquer, ou de nous tuer."* ²⁰⁵ and so long as one concentrates on this principle, then most situations should indeed resolve themselves.

A fortiori, were the attacker in, say, a homicidal attack, to be labouring under such pressures of the mind as would justify a reduction to manslaughter were he to be successful in his endeavours, the same principles would apply.

Defender-Precipitated Attack

However, there is one situation which has traditionally posed great problems to the writers, namely that of what one might call a defender-precipitated attack. Take the case of X who unlawfully attacks Y. Y is in a situation of private defence. He reacts with violence against X. However, his riposte does not end with the neutralisation of X, but continues far beyond the necessities of the occasion. Does the right of private defence in such circumstances revert to X, or is he deprived of the right to use force, because of his original attack?

It must be said at the outset that we are not discussing the case of someone who, *"under colour of necessity"*, deliberately provokes another so that he may then kill him under the guise of self-defence, for the premeditated nature of the entire scenario and its *dénouement* compels rejection of such a plea. 206

Now, as we saw earlier, violence which began in private defence could degenerate in a second phase of illegitimate force, in which the protective mantle of the law was lost. The question here is really, can the converse apply? Can force initially unlawful, become, by virtue of a change of circumstances, legitimate in the eyes of the criminal law?

The essential reason militating against such a view is the fact of X's prior fault, in that he brought the whole situation upon himself. Had he not struck in the first place, things would never have come to such a head, and the eventual injury or death of Y, in X's counter-riposte, would not have occurred. On the 'but for' principle, X is causally responsible for the injuries done to Y, and so should be held liable in law. As Alison put it:

"The person who commences violence must answer in law for its consequences; and if one of these consequences is the compelling the aggressor, even in self-defence, to slay the original object of his violence, he is still answerable for having feloniously imposed upon himself the necessity of taking away the life of another." 207

(Original emphasis)

And these words reflect the general sentiments of the other Scottish authorities of the day, who likewise found difficult to stomach the notion of acquittal for an individual who had *"brought the necessity upon himself"*. 208 In England, Hale permitted the original attacker to kill in self-defence where he was brought to this extremity when the fierceness of his opponent's assault continued despite his attempt to withdraw from combat, 209 and in this he was joined by Foster, 210 but this was repudiated by Hawkins who, expressing French sentiments of the time, 211 considered that *"such a Person seems to be too much favoured by this opinion, inasmuch as the Necessity to*

which he is at last reduced, was at the first so much owing to his own Fault." 212

There are indeed indications from the case reports that the accused could not plead private defence in such cases, killings in these circumstances being at least culpable homicide in Scotland 213 and manslaughter in England. 214 However, these are contradicted by the more modern decision in Robertson and Donoghue v H.M.A. 215 where Lord Justice-General Normand, speaking of self-defence said:

"...although an accused person may commit the first assault and may be, in general, the assailant, he is not thereby necessarily excluded from a plea of self-defence. If the victim, in protecting himself or his property, uses violence altogether disproportionate to the need, and employs savage excess, then the assailant is in his turn entitled to defend himself against the assault by his victim...the right of self-defence may be invoked by the original assailant as well as by a man who was at the outset his victim...(but) the victim of an assault who in resisting the assailant begins to overpower him does not become merely by the success of his resistance an assailant in his turn." 216

These words merit enthusiastic approval, for their clear exposition of the different issues involved. For again, the "complications" reduce to a single issue; either there is no excess on the part of the defender, in which case his acts are fully justified; or else he acts beyond the bounds of the law, in which case he loses the protection accorded by the latter, and therefore becomes subject to defensive force in turn - for he himself has become an assailant. His act is criminal, and subject to punishment by the courts; and therefore the writer cannot in any way agree with the proposition that "it would surely be inappropriate to classify the conduct of someone who provoked conflict and then later had to defend himself against excessive retaliation as conduct for the purposes of preventing crime." 217 not least for its denial of the very consequences which naturally flow from the rather restrictive rules of private defence posited by its author, namely, that if one breaches these rules, one cannot plead the cover of the

law. With respect, such arguments demonstrate, it is submitted, the "having one's cake etc." approach which characterises much of the restrictivists' argument.

Furthermore, those who support a manslaughter verdict for such cases of homicide (as opposed to acquittal) ²¹⁸ appear to ignore the fact that if the law is understood to have a deterrent effect, then there is an illogicality in threatening with conviction and punishment an individual who acts to prevent what is, by definition, a serious criminal attack upon him (indeed, even in the absence of private defence, he is surely still fully covered by the justification of prevention of crime). He is, in effect, punished for doing that which the law - both natural and positive - strongly enjoins him to do in any other circumstances. Such considerations, then, call into question any references to a "*qualified liberty to use force for self-defence.*" ²¹⁹

In terms of causation, the essential point is that an excessive riposte is by definition *unreasonable* - and it is not self-defence. This cannot be stressed too highly and it is the failure to recognise this which hinders a proper analysis of the issue. The original attacker is fully responsible for any action taken by the defender, and cannot plead self-defence against such a reply, but equally he cannot be taken to carry the weight of someone else's lack of self-control and failure to conform his actions to the standards set by the criminal law.

Indeed, one cannot help but suspect that underlying the restrictivist position, in England especially, is the lingering notion that self-defence is still really an excuse, an idea which regrettably, the courts and writers have been slow to dispel. ²²⁰ From this, then, one might understand a reluctance to allow an accused to court or encourage danger which negates his responsibility for his actions - *thus taking the risk of committing a criminal actus reus* - and then lead that very danger as a defence. However, private defence is not an excuse, but a plea in justification, in which every trace of criminality is totally effaced.

In contrast to Britain, from the very beginning of the 19th century private defence has been viewed in France, both by writers and the

courts, ²²¹ as a full plea in justification, and this undoubtedly partly explains the relative ease with which the authorities have accepted the notion of defender-precipitated private defence - certainly in cases of moderate initial violence. ²²² No case specifically decides the matter in France, but there are some grounds for believing, that indeed the modern day courts accept the principle. ²²³ So far as England is concerned, the situation must, until a case directly in point arises, remain highly doubtful; and it is to be noticed that even the Scottish judiciary, despite the decision in Robertson and Donoghue, ²²⁴ appear to retain a certain hostility to the notion. ²²⁵

It is submitted nonetheless, that it is entirely in line with both legal principle and logic that the scenario should again be viewed in two quite separate phases. The original assailant should be punished for the offence appropriate to his initial attack; ²²⁶ but his subsequent acts in defending himself against the excessive riposte should be fully covered by private defence. ²²⁷ This principle should be applicable whether the charge is one of homicide or a lesser one. There is undoubtedly a case for demanding stricter observance of the principle that there be no way of avoiding the force which was used in counter-defence, but this would merely be a sensible policy control over the actions of the individual who can claim less easily the indulgent eye of the law. ²²⁸

No doubt there would be a significant hurdle to overcome in maintaining such a plea to a jury. This would be especially the case where the initial attack was serious, given that (a) this gives rise to a *prima facie* right to use homicidal force, if so necessary and (b) in principle there must be a "cruel excess" ²²⁹ before the defender may be considered to be acting illegally - but stricter scrutiny of the facts should not be confused with denial of the legal principle behind them, ²³⁰ and it is indeed the very notion that a defender acting in the heat of the moment should not be scrutinised too harshly in his judgements, that as a corollary, urges recognition of the right of counter-defensive force for the original assailant, where his original victim has exceeded these generous bounds accorded him by the law. ²³¹

Clearly, in the cases of a serious or outright homicidal attack, the defender has the right to use every means at his disposal to neutralise the threat, and occasions would consequently be rare when such an individual would be seen as using unnecessary force. But, as we shall see in the following chapter, even homicidal attack does not as such give a "right to kill in self-defence", for the use of homicidal force in such circumstances is only permitted where this is necessary. If, then, by good fortune, or outside assistance he does fully secure his attacker alive, yet passes over to a revenge attack, there seems no reason for denying the original assailant the right of self-defence, although he remains subject to punishment for his prior attempt to commit homicide. The writer cannot, therefore, accept the distinction drawn by some French writers in particular, between a mere provocative assault, and an initial attack which was, *ab initio*, serious and possibly life-threatening, ²³² for this is to deny one of the fundamental principles of private defence, which the very same writers are at pains to spell out, namely that any use of force is subject to the requirement that it be necessary to ensure one's safety. ²³³

4 The Object of the Attack

A. The Defender

1. Physical Integrity

The protection of physical integrity has traditionally been the foundation stone of private defence; man's incorrigible willingness to use *unlawful* force is the factor compelling the law to recognise in his victim the right to employ *lawful* defensive force in reply.

From such violence the greatest threat one may face is of course the deprivation of one's life, and even today it is a testament to society's recognition of the enduring horror of such a threat that while debate may surround the precise boundaries of private defence, few dispute the legitimacy of violence used in prevention of such an occurrence. In both

Britain and France, it is within the context of such attacks that the concept of private defence has been most discussed, and most observed in the case reports.

Equally, regarding the infliction of grievous bodily harm, there can be no doubt that one may reply against such an attack, or the threat of such attack, by employing force. There are two ways of looking at the issue. Firstly, there is an obvious danger in such cases of the victim actually being killed where force of this gravity is used, and therefore it would fall under the earlier heading. But equally, it may be accorded a separate status in its own right, and here the issue of the balancing of values enters the scene, under two different guises.

Firstly, one may argue that the infliction of serious bodily harm is an attack of sufficient gravity to justify the use of potentially deadly force, where necessary, in its prevention. There are however, several complicating factors. Firstly, so far as England is concerned, the right of private defence is now framed heavily in terms of "reasonableness", making it difficult to state with any degree of certainty just what view the law would take on a particular case. ²³⁴ Also, the variation in the individual facts of each case is so great that the search for clarity on the matter is rendered even more difficult. Thirdly, given that many of the English decisions actually concern procedural issues, there is a relative paucity of direct dicta from which a studied interpretation of the true state of the law might be attempted. And finally, it must be appreciated that *whether a given case ends up in court as one of homicide or one of wounding is all too often simply a question of pure chance or the skill of a surgeon.* A stabbing may, or may not, result in homicide, and therefore it invites caution when discussing what one supposes is 'a right to kill' in such or such a situation. It is arguably more appropriate to speak of a right to use deadly force. This last point the writer cannot stress too highly. Indeed, as we shall see later, ²³⁵ it is precisely the failure to recognise this element of chance which pervades private defence in its practical manifestations, that has led the courts and academics in France into regrettable confusion.

But this notion of a balancing of values appears in a second way, which introduces one of the fundamentals of private defence in all three jurisdictions. For, even if one rejects the possibility of a deadly riposte against the threat of grievous bodily harm, no reasonable observer can ever claim that there is no right to use any force in defence - private defence is not a case of all or nothing, and it is the possibility to use a graduated response in some proportion with the gravity - or lack of gravity - of an attack that runs through the core of the law of Scotland, England and France.

It is this basic principle which permits private defence to extend to action taken against even non-serious assaults, a principle which Scots and English have come to accept. ²³⁶ Recognition of this in France is now firmly established, ²³⁷ despite hesitations dating from the 19th century on the part of some academics, who rejected the possibility of private defence against assault. ²³⁸ This was not without some logical basis, for as Professor Bouzat points out *"Si l'on interprétait littéralement l'article 328, on déciderait, d'une part, que la légitime défense ne justifie que l'homicide, les blessures et les coups, et d'autre part qu'elle les justifie dans tous les cas. Ce serait une double erreur."* ²³⁹ Many were thus induced by the wording of Article 328 to restrict the plea to situations where the threat was *"grave et irréparable"*, ²⁴⁰ rejecting the possibility of self-defence against a light assault, but while one may in passing point out that every harm is in a sense *"irréparable"*, in that no amount of damages or punishment may efface the reality of its infliction, ²⁴¹ such attitudes stemmed from a failure to differentiate between the existence of the right of private defence, and its scope in a particular case. ²⁴² But if the *Code pénal* allowed homicide and wounding in certain circumstances, then, as Garçon points out, ²⁴³ *a fortiori* it surely allowed lesser violence in appropriate circumstances, whatever the actual wording of the text. And, as mentioned earlier, of no small significance is the fact that the use of mild force to 'nip in the bud' an assault against oneself will arguably often prevent the attack from escalating to a more serious level.

Equally, the plea may be applicable where the attack was upon one's own sexual integrity, a point explicitly accepted in all jurisdictions. The law's recognition of the importance of this most intimate of 'territories' is such



that, the crime of rape has traditionally been viewed as justifying as grave a riposte, where necessary, as when one's own life has been at risk. ²⁴⁴ There can be no doubt that the crime of rape is in a class of its own regarding private defence, for while some doubt may remain as to the degree of riposte justified to prevent grievous bodily harm, ²⁴⁵ no such uncertainty surrounds the former, and rightly so, for the gravity of the crime and its appalling consequences should not be measured in purely physical terms. It would be utterly wrong to posit the defensive right purely on the (undeniable) risk of serious physical violence which accompanies the offence. While the position regarding a sodomitical attack is not so certain - in Scots law at least, the possibility of a homicidal riposte having been rejected in McLuskey v H.M.A. ²⁴⁶ - the fact that one may lawfully use some force cannot be disputed, ²⁴⁷ and similarly, a graduated response in face of an indecent assault would be perfectly justified. ²⁴⁸

Also, the use of defensive force may be justifiable where the attack is upon one's liberty of movement. No doubt, any restraint upon one is in itself an assault, but beyond this one may consider an attack such as an attempted kidnapping, hostage-taking as a species in its own right. As any witness to the changing 'fashions' of the 1970s and 1980s may testify, this odious offence clearly carries an implicit threat of physical harm, possibly serious harm, to the victim, which in itself suffices to justify the use of force, and in many situations, whatever the manner of the initial abduction, it is submitted that one is entitled to fear the worst of such an aggressor. ²⁴⁹ It follows from this that the writer does not consider that one's assailant need have reached the stage of a criminal attempt, for one to pre-empt him with force aimed at forestalling the crime in question, such as murder. ²⁵⁰ But even the mere fact of unlawful imprisonment or restraint is again an attack which, irrespective of the assault element, cannot be made with impunity, and while French law does not share the libertarian spirit of its English counterpart when dealing with purported detentions attempted by officers of the law, ²⁵¹ it rightly admits the principle that one may defend against an illegal sequestration by a private individual. ²⁵²

11. Human/'Personal' Integrity

Different, however, must be the situation where the aggression is not so much physical, as an attack upon, say, one's reputation, honour and so on. For such attacks, however unpleasant, arguably do not justify a breach in the prohibitive norm against the use of physical violence, which is far more immediate in its consequences, and more grave an assault upon both the individual and society than any harm which the former may present. And like it or not, the preoccupation of the criminal law is precisely that which is largely immediate, and demonstrably harmful.

Thus, while the law may accept that opprobrious words or gestures may amount to provocation, ²⁵³ they cannot in law, and should not, ever amount to a justification of violence, and there is very good reason for this. For trite as it may sound, the "sticks and stones" maxim has a solid foundation in law, and is valuable in highlighting that whatever one may say to another, however gross the insult, this cannot kill, this cannot injure physically. And therefore, so long as the 'aggressor' has not begun to use violence, then it is submitted that the law has every right to demand that the 'defender' does not alter the nature of the confrontation by introducing into it the dangerous element of physical force, where the fine line between an alleged justification and a provoked act would be so difficult to determine, and so dangerous in its implications.

Obviously, in some cases, insults may give rise to a legitimate and reasonable fear of an impending assault, but in that case any defensive force is not employed to protect one's honour or reputation, but one's body in face of the anticipated violence. ²⁵⁴ The courts are available to those who seek reparation, and as we shall see later, there are possibly other actions which may be taken by the defender in law by way of 'defensive action' ²⁵⁵, but insofar as the use of physical resistance to such an 'attack' is concerned, the writer cannot ever see such action as justified, though clearly it may be powerful in mitigation.

But into this sphere of 'personal integrity' falls the famous decision of Tribunal de Police de Valence 19 mai 1960 (Epoux Y et dame X). ²⁵⁷ The facts were that the accused, the mother of a sixteen-year-old youth, had

been worried for some time by the activities of her son. He had taken to consorting with an eighteen-year-old girl, whose obvious lack of moral rectitude had in no small way been responsible for the neglect he had shown for his studies. The mother, alarmed that her son was jeopardising his future, and risking an early marriage, possibly enforced by circumstances - to a girl who had done little to ingratiate herself with the accused by secretly sending the youth a salacious photograph of herself - consequently attempted to put an end to the flirt, but to no avail. Her son continued surreptitiously to meet the girl, with the encouragement of her parents, who were aware of the accused's feelings on the matter. Matters came to a head when the accused decided to "have it out" with the girl. Words were exchanged, and finally the exasperated mother slapped the girl in the face - the result of which was that she obtained the result she had so earnestly sought over the previous weeks, and the liaison came to an end.

Charged with assault, she was found not guilty by the court, which expressed itself as follows:

"Attendu... qu'en l'espèce, une menace sérieuse pesait sur le jeune X...Jean, dont l'avenir risquait d'être compromis par l'influence de la jeune fille, puisque celle-ci l'avait incité à abandonner ses études; que la mère pouvait, en outre, craindre à bon droit que la demoiselle Y..., par ses provocations, n'amène le jeune garçon à se lier à la jeune fille dans des conditions qui auraient pu rendre le mariage nécessaire, alors que ce mariage paraissait contraire à ses intérêts moraux les plus évidents...; que cette riposte n'excède pas la gravité de la menace; qu'il s'agit tout au plus d'une gifle banale, n'ayant causé aucune blessure; qu'il y a donc lieu de considérer que la dame X... a agi en état de légitime défense....."

With regret, the present writer cannot agree with the decision taken by the magistrates in this case, a judgement which has nonetheless attracted much approval in French academic circles. ²⁵⁰ Firstly, the greatest error by the court was probably to confuse moral issues with legal issues, and indeed the judgement is heavily couched in moral terms. ²⁵¹ Not only this,

but there is clear evidence that the judges viewed the slap as virtually merited in punitive terms, ²⁶⁰ which has little to do with private defence - though it does, on the other hand, bear upon the question of provocation. Secondly, it took things even further by effectively adopting an interventionist stance in support of action reinforcing what were in effect judgements of parental choice ²⁶¹ - important as they are, but hardly sufficient *per se* to justify enforcement by physical violence. Fears of a premature marriage may well be legitimate concerns of parents but the notion that these might be backed up by force when in jeopardy surely cannot hold. To point then to the issue of moral danger, while perhaps more compelling, is surely insufficient justification - how many families have seen sons or daughters become romantically - or not so romantically - involved with undesirables ? It seemed, further, from the facts of the case that no criminal offence had either been committed or threatened by the girl. And finally, not only was the threat surely too vague to constitute justification in law for the assault, but the riposte fell foul of the fundamental requirement of imminence, for even denying the former objection, it is difficult to detect any urgency in the situation which presented itself to the accused.

In the circumstances, one cannot but feel the greatest sympathy for the accused, who found her efforts of persuasion thwarted at all stages, and finally resorted to one single gesture, which actually obtained the desired result. But the decision, almost certainly unrepresentative of English and Scots law, is arguably wrong, in its confusion of moral and legal issues, and its consequent failure to differentiate between provocation and justification, and it is submitted that particularly regrettable was the court's failure to realise the possible consequences of its dilution and extension of the scope of circumstances permitting an individual to resort to physical violence in his or her defence, or that of another. ²⁶²

111. Property

The controversial question of whether - and if so, the extent to which - one may use force to defence ^d one's property raises such important issues in the

area of private defence, that it deserves separate treatment, and a chapter is devoted to the topic later in this study. 263

B. Third Parties

The question of whether the principle of private defence extends to third party intervention in the defence of another has long been a source of dispute. Though it seems this right was well recognised in ancient times, 264 to this day the law remains unclear in the common law jurisdictions. And if one thing more than any explains this, it is arguably the fact that in earlier times private defence assumed the restrictive characteristics more of an excuse than a plea in justification. Excuses being largely specific to the individual actor, there could be little reason for permitting any third parties to avail themselves of the plea as if it were a public right. And a legal system which referred to the reflexive "*se defendendo*" 265 was hardly illogical in demanding that the person pleading private defence must have been the person threatened.

Nonetheless, some measure of indulgence was shown the accused where he killed in order to defend a person to whom he was more than a mere stranger. Citing Hale, 266 Stephen accurately described the general state of the authorities when, speaking of self-defence in a quarrel, he wrote:

"Under this excuse of self defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed as the act of the party himself ..." 266

This is not to say that one could not kill to defend strangers. Hale, for one, accepted that such a privilege existed, but the rationale lay more often than not in the catch-all of prevention of crime, and not private defence - which admittedly, as Professor Williams remarks, "*comes to much*

the same thing." 267. This categorisation of the law similarly found reflection in caselaw - though not with total uniformity. In *R v Rose* 268 the trial judge charged the jury (somewhat restrictively) on the special relationship extension to self-defence, in "preservation of life". 269 In *Chisam* 270 the appellant had been convicted of manslaughter, having pled self-defence in defence of a relative, and the Appeal Court appeared in principle to accept this as a legitimate plea. The extension was recognised, but whether it stopped at the special relationship was still unclear, and remarkably, when the case of *R v Duffy* 271 came to be decided in 1965, this question was still unresolved.

The appellant had gone to the aid of her sister who one evening became involved in a fight in a public house with a male customer, one A.. Seeing her sister wrestling on the floor with blood on her, she went up to A and hit him on the back of the head with a bottle, which smashed, causing him severe lacerations. At her trial, the judge expressly withheld self-defence from the jury, apparently on the grounds that such a plea fell outwith the special relationships category, and the appellant was convicted of unlawful wounding. Her appeal was successful, the court holding the trial judge's actions to have been unwarranted. No reported case, it was said, went outside the classes specified by Hale. 272 Yet, tellingly, their Lordships sidestepped any declaration on the state of the law of private defence. Referring to the "technical limitations on the application of the plea of self defence" the Court stated that it was not concerned to consider what these limitations were, and chose instead to frame the use of force in terms of the "general liberty even as between strangers to prevent a felony." 273

In the result, we appear to have no modern English authority extending self-defence beyond the "principal civil and natural relations", 274 and even then there is a marked reluctance to state what these relations are. 275 North of the border, similar hesitancy surrounds the subject. Hume distinguished the case of defence against the unilateral attack of a felon from that of self-defence arising out of a quarrel, permitting one's "friends, servants and others ... along with him" to intervene in the former case - but never in the latter. 276 Burnett expressed similar views. 277 Despite the doubt which surrounds Hume's twin formulation of the law, the case of *H.M.A. v Carson and Another* 278 seems to justify his principle of extended

self-defence, though its precise basis remains unclear. There, Lord Wheatley told the jury in a trial for assault that a man could be "justified in killing in defence of his own life against imminent danger or of the lives of those connected with him", and declared it applicable to non-homicide cases too. Likewise in John Forrest ²⁷⁹ when "(f)our women were under his care" the panel had acted in their defence, and was subsequently vindicated in his plea of private defence against a charge of culpable homicide.

While, therefore, intervention to protect another is accepted, its precise scope is not entirely clear, for in theory whether the law will accept the plea of private defence outwith the special categories described remains open to question. Burnett certainly entertained doubt on the matter, ²⁸⁰ while Hume's ambiguous comments regarding intervention to prevent a rape do little to dispel the notion that the plea somehow remains more an excuse than a justification; ²⁸¹ Alison on the other hand suggested the general right here extended to all. ²⁸² True, it seems inconceivable that anyone acting within reasonable bounds, without "cruel excess", would be denied acquittal - but one is left guessing as to how the law on the matter would be articulated in a given case.

It is submitted that in both jurisdictions, the courts would do well to declare openly that the law of private defence extends to a general right of third party intervention - whether relative or stranger. ²⁸³ It may be that they are inspired in their reluctance to do so out of concern for the accused that the rules surrounding self-defence have historically been stricter than those covering force in "prevention of crime" ²⁸⁴ - but one is more inclined to perceive their caution as the natural expression of a minimalist view of private defence - though recent signs indicate a shift in the law in England, as we shall see later. Be that as it may, traces of the notion of private defence as a subjectively-based concession to human weakness still appear to be in evidence, and so long as this is so, one may guess that the unwillingness of the courts to redefine the earlier authorities in light of modern day conditions will persist.

France - Private Defence and Article 63

In contrast, French law has not experienced such problems, benefiting from the fresh start offered by the post-revolutionary period. 205 From early on, private defence was seen as a matter of justification, and the new Code itself avoided any ambiguity by employing the more general term of "*légitime défense*", rather than the misnomer of the common law. 206 The justification of third party defensive force under Article 328 of the *Code pénal* is an accepted fact, whatever the relationship involved, and is reflected in numerous cases without the controversy which surrounded cases such as *Duffy*. 207

One matter, though has aroused some debate. Article 63 of the *Code pénal* creates, *inter alia*, the offence of failing, voluntarily, to prevent a *crime* or *délit* against the person of another. Consequently, accused persons have occasionally sought justification for their acts under this provision of the code, rather than rely upon Article 328. In this they have been supported by some academics who argue that the effect in some instances is to transform private defence from a right into a duty. 208

Falling into this category is the famous decision of the Cour d'appel d'Alger 9 novembre 1953 (M.P. et Bussutil c Zeghoudi). 209 There, a group of children had been playing with marbles, when another child began throwing stones in order to spoil their game. One of the group, B, picked up a stone and threatened the child, and at that moment Z came upon them. Seeing what was about to happen, he ordered B to drop the stone, and when he failed to do so, Z grabbed him by the wrist, but with such violence that the child fell to the ground, his arm broken. Although it convicted him on appeal - the force used having been judged excessive - the court with some sympathy expressly recognised that he had acted in good faith and in accordance with the provisions of Article 63:

"Attendu que ... Zeghoudi s'est conformé aux dispositions de l'art. 63 c. pén. qui lui faisait obligation d'intervenir immédiatement pour empêcher, sans risque pour lui ou pour les tiers, soit un fait qualifié crime, soit un délit contre l'intégrité corporelle de la personne ..."

It will be obvious, however, that the provision is of restricted application. For the obligation will only apply, as Pageaud says, "*dans les hypothèses exceptionnelles où cette défense peut être considérée comme sans risque pour l'intervenant.*" ²⁹⁰ Certainly, the circumstances here were somewhat exceptional, and few cases are available to indicate this particular operation of Article 63. ²⁹¹

An interesting footnote, however, is provided by the judgement of Cr 19 février 1959 (Reminiac), ²⁹² a vital decision on private defence which we shall examine later. ²⁹³ There, R was convicted by the lower court of voluntary wounding, and also under paragraph 2 of Article 63. This provision creates a "Good Samaritan" obligation (independent of private defence), again in circumstances where there is no danger to oneself or to others. Thus, not only did his plea of private defence fail, but the court condemned him for having failed to go to the assistance of the very intruder he had intentionally shot. The *Cour de cassation* declined, on technical grounds, to pronounce upon the substance of his appeal on this point, yet one may regret that it did not take the opportunity to condemn such illogical jurisprudence. As the commentators to the decision pointedly remarked:

"... ici il y a bien eu poursuites, et même condamnation, et on se trouve ainsi devant cette situation paradoxale d'un individu condamné pour n'avoir pas porté remède au mal qu'il a précisément voulu causer." ²⁹⁴

And the distinction between private defence as a right and as a duty was indirectly shown by the interesting case of Cr 13 avril 1976 (dame Veuve Delabesse) ²⁹⁵ where D sought to overturn the *arrêt de non-lieu* returned in favour of several police officers, who, she claimed, had stood by when faced with a deranged attacker wielding a knife who had already seriously injured a police brigadier before turning upon her. The lower court rejected the allegation of an offence under Article 63 paragraph 2, declaring enigmatically that "*les agents n'auraient pu agir que dans le cadre étroit de la légitime défense*". Her *pourvoi* to the *Cour de cassation* was declared inadmissible, but what emerges from the case is the confirmation

that recourse to Article 63, whether as a justification or by way of accusation will be severely limited where the danger lies in unlawful violence against the person.

And these words of the *Cour d'appel* "*le cadre étroit de la légitime défense*", provide a convenient point at which to introduce the next major section in this study. For having looked at the principal characteristics of the attack, we are prompted to consider its consequences, triggering as it does the right of riposte. It is to such considerations that we now turn, as we examine the precise rules which govern the manner in which a person may, in his own defence or that of another, exercise the privilege of violence against an aggressor.

APPENDIX

1. Indeed, it is interesting to note that the French writers frequently adopt the term "réel" in describing one of the conditions which the attack must fulfil before private defence is allowed; eg Cattan, *supra*, 47; Chammas, *supra*, 114.
2. E.g. Bourges 15 novembre 1905 S.1906.2.277; D.1906.5.38 (Aurat c Dupont et Marquis de la Roche).
3. It is hoped that the reader is already alerted to the inherent ambiguity in private defence. The victim of the attack who fails to exercise the right remains a victim, but for want of a riposte never has the chance of claiming a *posteriori* an exercise of legitimate defensive force. On the other hand, the victim who successfully resists his or her aggressor will stand in court labelled as an aggressor (leaving aside of course the presumption of innocence), and the true aggressor labelled as victim, until the plea of private defence is made out. For a closer examination of the ambiguity in this relationship of victim and attacker, see Delmas-St. Hilaire, J.P., *La Crise de la Légitime Défense dans la Doctrine Contemporaine*, in 14^{ème} journées franco-belgo-luxembourgeoises de science pénale, Pau, 18-19 octobre, 1974.
4. One will never know for certain that the attacker one disabled was not, for example, about to desist voluntarily, or was only intending a very mild form of assault rather than that which one apprehended. True, such things are perhaps improbable in most cases, but they are by no means impossible, and so long as this is the case, the claimed 'reality' of the particular attack in question must always remain questionable.
5. Chambéry 6 février 1907 D.1907.5.19 (Dorioz).
6. (1879) 14 Cox C.C. 346, 351.
7. (1937) JC 53, 58.
8. See eg R v Rose (1884) 15 Cox CC 540 per Lopes, J at 541; R v Redman (1978) VR 178, per Kaye, J at 178; R v Fegan (1972) NI 80, per MacDermott, LJ at 88; Attorney-General's Reference (M.L.) (No.1 of 1975) (1976) 2 All ER 937, per L. Diplock at 946; H.M.A. v Kizileviczius (1938) JC 60, per Lord Jamieson at 62; Owens v H.M.A. (1946) JC 119, per LJ-G Normand at 125; H.M.A. v Carson and Another (1963) SLT 21, per L. Wheatley; Fenning v H.M.A. (1985) SCCR 219, per L. Mayfield (trial judge) quoted at 220; Tribunal correctionnel de Lyon 16 juillet 1948 (G. c D.) D.1948.550; Cr 25 mai 1977 L.76-92.457 (Vamo); Cr 7 juin 1968 B.C. no.186, citing lower court. Stephen, *Digest*, p252; Hume, *Commentaries* Vol 1 p224; Burnett, 42; Alison, 1, 20, 101; Merle, R. et Vitu A. *Traité de Droit Criminel* Vol 1, p511; Delmas-St. Hilaire, *Jurisclasser Fénal Faits Justificatifs* no. 141; Jousse, *Traité de la Justice Criminelle de France*, Pt. IV, Tit. XXI, Art. VI, no.60 p506; Pradel, J, et Varinard, A., *Les Grands Arrêts du Droit Criminel*, p206; Puech, M. *Les Grands Arrêts de la Jurisprudence Criminelle*, p286; Garçon, A328 nos. 27-31; Légal, RSC 1955 314, 314.

It is interesting, though, to note the frequency with which one finds the expression *reasonable belief* and its synonyms surrounded by inverted commas. One has the distinct impression that the French are still very much aware of the Anglo-Saxon pedigree of this concept, and

consequently have yet to embrace it fully. For just one example, see Bernardini, R., note sous Nancy 9 mars 1979 D.1981.J.462, 465.

9. C.f. Légal, A., RSC 1955, 313, 314; also eg Cr 17 mars 1910 B.C. no 133 (Couriault).
10. For example, if D is accosted as he strolls on the outskirts of a maximum security hospital or prison, he may undoubtedly have strong grounds for fearing that he is in great and immediate peril. On the other hand, it should not be taken that the absence of any unusual or special characteristics should count against a claim of private defence - after all, an attack is an attack wherever it occurs. Rather, the point is that the presence of such factors is, or should be, particularly beneficial to the accused, in the interpretation of his actions.
11. Williams, G. Ll., *Textbook of Criminal Law*, 2nd ed., London 1983, 502.
12. Cr 7 août 1873 B.C. no 219 (Cantau); Assises de la Seine 26 octobre 1960 GP.1961.1.86 (Vve. Gardet c Mayoux) - "Emmène les enfants parce que ça ne va pas être beau à voir"; Tribunal de Grande Instance d'Aix-en-Provence 21 mars 1968 GP.1968.2.67 (Vinas); Cr 31 janvier 1974 GP.1974.I.278 (Gosse) - "Foutez le camp ou je vous bute" followed by a sudden movement of the hand.
13. E.g. Cr 23 juin 1887 B.C. no. 237 (Cazalets et Pescetti); T.C. d'Ambert 5 juin 1956 G.P. 5-7 septembre 1956; D.1957.S.63 (Malcurat c Convert).
14. Tribunal correctionnel de Lyon 16 octobre 1973 JCP 1974.2.17812, note Bouzat (Ministère Public et Djezzar Omar c Vernet). "Les juges du fond tiennent compte, le cas échéant, de la connaissance qu'avait le prévenu des agissements antérieurs de l'agresseur." Larguier, J, RSC 1975, 406, 408.
15. E.g. Cr 23 juin 1887 B.C. no.237 (Cazalets et Pescetti); Tribunal Correctionnel de Lyon 16 juillet 1948 D.1948.550 (G c D); Cr 20 novembre 1956 B.C. no.761 (Driot); Paris 9 octobre 1978 JCP 1979.2.19232, note Bouzat (Sencier). This question of the location of the attack takes on a particular significance where the dwelling is concerned, and the Code pénal sets out a separate provision (A329 (1)) to cover this type of attack. This will be discussed more fully in Chapter 4.
16. Tribunal de Grande Instance d'Aix-en-Provence 21 mars 1968 GP.1968.2.67 (Vinas); Assises de la Seine 26 octobre 1960 GP.1961.1.86 (Vve. Gardet c Mayoux).
17. E.g. R v Hopkins (1866) 10 Cox C.C. 229; R v Weston (1879) 14 Cox C.C. 346; R v Rose (1884) 15 Cox C.C. 540; R v Humphreys (1919) 14 CAR 85; c.f. Attorney-General's Reference (No.2 of 1983) (1984) 1 All ER 988; John Forrest (1837) 1 Swin. 404; H.M.A. v Kay (1970) SLT 66; H.M.A. v Grudins (1976) SLT (n) 10. The justification is well captured by counsel's submission in H.M.A. v Kay, supra, and upheld by Lord Wheatley, to the effect that (p67): "... the defence could not lead evidence of a general propensity to violence in the part of the deceased ... unless she was allowed to establish that she had been

assaulted with a knife by him before. Only by adducing such evidence could she establish her reasonable belief that violence would be inflicted upon her." See also H.M.A. v Grudins (1976) SLT (n) 10, per Lord Stewart at 11: "... it is not uncommon, in what are termed 'domestic' murders to allow some history of the background to be led in evidence and this is particularly understandable in a case where self-defence is pleaded."

Of particular interest in this context is the case of T.C. Seine 18 novembre 1938 GP.1939.1.209 (Ministère Public et Panico c Conquet), (seemingly approved by Delmas-St. Hilaire, J.-P. in *Jurisclasser Pénal, Faits Justificatifs* no .104), where the court found confirmatory evidence in the fact that several days after the incident in question, two workmates of the accused, who was their foreman, were assaulted in the Paris métro. The plea was that Conquet had acted in private defence against strikers who were threatening those workers sent to replace them, and causing havoc on the building site concerned. The court found support for this plea in the subsequent incident. It is submitted that while this may fall legitimately within the terrain of the inquisitorial system which characterises the procedural framework of French criminal justice, evidence of this sort would probably not be permissible within either English or Scots law.

18. Should one be in any doubt, consider the following simplistic, yet illustrative question - at school would one rather have been attacked by the local bully, or by the school weakling ?
19. JCP.1979.2.19232.
20. *Id.* For near identical facts and judicial analysis, see T.C. Lyon 16 juillet 1948 D.1948.550 (G. c D.).
21. Of the number of cases, old and new, which are frequently - and rightly - cited as illustrating this circumstantial approach, it is surprising how many involve officers of the law e.g. Cr 7 août 1873 B.C. no 219 (Cantau); Cr 23 juin 1887 B.C. no 237 (Cazalets et Pescetti); T.C. Lyon 16 juillet 1948, *supra*; Cr 31 janvier 1974 GP.1974.1.278 (Gosse); Cr 2 octobre 1979 L.79-90.148 (Benghenissa). There is of course a certain irony here. For one might think that a greater degree of circumspection should be demanded of policemen, given their training and privileged position of authority. But the writer would wish to point out that their rôle in France makes them more likely and more frequent targets for criminals who themselves not infrequently also carry firearms.

In Cr 2 octobre 1979 L.79-90.148 (Benghenissa) the lower court showed just how broad were the circumstances it was willing to take into account: "... aux motifs que ... il n'est pas nécessaire d'être un criminel dangereux pour porter sur soi une arme; que même dans cette hypothèse, il n'est pas obligatoire pour un criminel de tirer "à la première occasion" sur un policier poursuivant;... que par contre l'expérience montre qu'un simple voleur peut être armé et par conséquent en puissance." Such words merit full approval, especially on the facts of the particular case.

22. GP.1965.1.155.

23. GP.1979.655, note P.-L.G.; D.1981.J.462, note Bernardini.
24. It is submitted that their relevance to Article 328 private defence is substantially diminished by their close proximity, on the facts, to the conditions of Article 329(1) private defence, which relates to the special case of nocturnal dwelling defence, a concept which has since time immemorial been accorded a special status in the criminal law; see *infra* Chapter 4. Likewise, the important decision in Cr 18 octobre 1972 B.C. no 293 (Thieblemont), where the *Cour de cassation* annulled the decision of the *Cour d'appel d'Aix-en-Provence* rejecting pleas of private defence by a mother and son who had, while out camping, fired at figures moving ominously around and towards their tent. The Supreme Court found that "*le comportement pour le moins inquiétant de ces individus, ayant occasionné une crainte profonde chez une femme et un garçon de 17 ans, isolés sous une tente au milieu de la nuit*", to which the lower court adverted, imported a fatal contradiction into the reasoning of the latter, thus of necessity requiring reversal of the judgement.
25. E.g. T.C. Lyon 16 juillet 1948 *supra*, c.f. Cr 25 mai 1977 L.76-92.457 (Vamo); and see Cr 7 juin 1968 B.C. no 186 (Fage); Delmas-St. Hilaire, J.-P., *Jurisclasser Pénal Faits Justificatifs* no. 141.
26. Hence the frequent references to "*légitimement se croire en danger ..*" etc. T.C. Lyon 16 juillet 1948 *id.*; "*a pu légitimement craindre*" - Cr 25 mai 1977 *id.*. See also Cr 7 décembre 1971 B.C. no. 338 (Pesleux); Cr 27 février 1980 L.79-91.713 (Cellarius); Cr 25 février 1981 L.80-91.178 (Odor) - "*... rien dans l'attitude de la victime ne pouvait permettre au prévenu de penser que sa vie ou celle de ses proches était exposée à un danger grave et imminent.*" Also Cr 5 janvier 1982 L.81-91.624 (F...) (see lower court); Cr 18 octobre 1983 L.83-90.831 (T...) (see lower court); Cr 16 septembre 1985 L.84-93.875 (C...). C.f. Emperor v Lal Baksh (1945) 46 Crim. L.J. 736, 737.
27. In Crawford v H.M.A. (1950) SC (JC) 67.
28. (1937) JC 53.
29. A criticism which they received; see Crawford v H.M.A. (1950) JC 67, per Lord Justice-General Cooper at 69-70.
30. *Id.* at 70. His Lordship seemed to imply (while Lord Keith stated it outright) that provocation should probably have been the correct plea. This is all the more ironic for the fact that their Lordships appear to have committed a variant of the very error for which they faulted the 1937 court.
31. Burnett, J. *Treatise on the Various Branches of the Criminal Law of Scotland* (Edinburgh 1811) p.42.
32. See the explicit statement to this effect in John Forrest (1837) 1 Swin. 404, per Lord Moncrieff at 418. Also R v Fegan (1972) NI 80, per Lord MacDermott, LJ (djc) at 88.
33. See however the article by Françon, A. *L'Erreur en droit pénal* in *Quelques Aspects de L'Autonomie du Droit Pénal*, ed. Stéfani, G., (Paris

1956) p227 et seq. The writer postulates that error is theoretically irrelevant re "délits non-intentionnels" (eg "involuntary homicide"), a stance not infrequently adopted by French academics: "... elle sera en principe inopérante dans les délits non-intentionnels parce qu'il n'y a, en règle générale, aucune incompatibilité entre l'existence d'une erreur et celle de l'imprudence ou de la négligence qu'il s'agit de réprimer dans ce genre de délit." (p229).

But this view is open to criticism, on three grounds. Firstly, one might well object that what is at issue is a reasonable error, and there consequently emerges an inherent circularity in his argument. At p329 Françon suggests that whatever theory says, it might be possible to allow what is known as *l'erreur invincible* as a defence where even *délits non-intentionnels* are concerned, and he cites Belgian law in support: "*cette erreur étant étendue comme celle que tout homme raisonnable et prudent, placé dans les mêmes circonstances, aurait commise.*" But if the error was reasonable, then there can hardly be any question of an "*imprudence*". So it is not that the *mens rea* for the *délict non-intentionnel* has been negated; the fact is that the *délict non-intentionnel* has never been constituted from the outset. And this leads on to the second objection. For it illustrates an error which has been all too common in France, and the consequences of which for the law of private defence have become both far-reaching and disconcerting. The error lies in the confusion between the charges laid against an accused and the juridical basis of his acquittal/justification. For example, Françon cites (p246) a well-known French case where the charge was one of *homicide par imprudence*. (Dijon 21 mai 1954 D.1954.444) and where the accused was acquitted. But it is clear that the error of the accused in question was a reasonable one, and therefore it is wrong to suggest from this that reasonable error "works" for *délits d'imprudence*. In effect we see the image of the tail wagging the dog, and what many academics fail to perceive is that the issue of the charges laid against an accused may not bear upon the rationale underlying his acquittal. And finally, one may point out that Françon appears to confuse the issue of standards in the civil law with those imposed in the criminal law (though he does appear himself to recognise this difficulty at one point - p240). What this indicates is that we should begin to think more seriously about, and examine more closely, the juridical basis of pleas in justification and excuses, and the actual offence which is *prima facie* involved. It is the French who for the most part are obliging us to confront these issues.

34. (1884) 15 Cox 540.

35. See Hawkins, *Pleas of the Crown* (1716) Book 1 Ch. 28 p73; *R v Weston* (1879) 14 Cox C.C. 346, and Levett's Case, where the master of the house killed a helper his maid had taken on without informing him, and who had hidden in the buttery out of fear while he searched the house for intruders he believed to have entered his dwelling during the night - *East Pleas of the Crown* 274-5; cp. Hale PC I 474, who preferred to put it in terms of "misadventure".

36. *R v Dennis* (1905) 69 JP 256, cited by Williams, G., *Criminal Law - The General Part*, 2nd ed. (London 1961) p207, footnote 2; *R v Chisam* (1963) 47 CAR 130; *R v Wright* (1971) Crim. L.R. 477; Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975) (1976) 2

All ER 937, per Lord Diplock at 946. See now *R v Williams* (1984) 78 CAR 276.

37. (1946) JC 119.

38. *Ibid* at 125. C.f. Gordon, G., *The Criminal Law of Scotland*, 2nd ed. (Edinburgh 1978) p327; *Eraser v Skinner* (1975) SLT (n) 84.

39. If true error it was, for whether it was one of substance or merely degree, one cannot be certain. The clue lies in the words "completely wrong". For one might object that one is either wrong or one is not wrong - there are no degrees of "wrongness". However, it may be that in importing the term the trial judge (Lord MacKay) had in mind a belief, an erroneous belief, which lacked all objective foundation - in other words, an unreasonable error. Even so, it would seem unduly harsh that in such circumstances the conviction should be for murder (but see *R v Rose* (1884) 15 Cox 540, per Lopes, J. at 541-2). If indeed this is what Lord MacKay meant - though admittedly the evidence is far from conclusive - his error would have seem to have been in not putting this sufficiently clearly to the jury.

40. The authorities are indeed by no means clear on the matter, though there is a certain logic. Alison (*Principles of the Criminal Law of Scotland*, Edinburgh 1832, 139) cites the case of "Lovat" (sic, *supra*) with approval, as the error was in no way blameworthy. (See also Anderson, A.M., *The Criminal Law of Scotland*, 2nd edition, Edinburgh 1904, p18). But it must immediately be observed that the case concerned dwelling defence and has therefore to be taken along with that qualification in mind. Their true attitude is detected earlier in Alison (p102) and in Hume (1, 224). Both writers cite, *inter alia*, the example of someone who assaults another in sport with a foil and is thereupon killed. Both agree that some censure "must undoubtedly follow", for the law cannot admit "such precipitate measures" (Alison, 1, 102) based on a "false and hasty opinion of danger ..." (Hume, 1, 224). Both authors again, cite the case of Captain John Price and others, November 26th, 1690. There the accused had been ill-treated in a tavern, and were then assailed by a violent crowd outside who attempted to gain forcible entry, obliging them to barricade themselves inside and draw their weapons. When the doors were broken open, the panels fired at their supposed assailants, only to find that they had killed a corporal of the town guard, which had meantime arrived on the scene. This mistake was enough "only to restrict the libel to an arbitrary punishment".

One might argue that any such mistake was quite reasonable in the circumstances, certainly in today's terms. Nevertheless, placed in historical context the case does accord somewhat with the thinking of the time. The key lies in the question of the imminence of the attack. As we shall see later, Scots law has habitually demanded strict adherence to the principle that one could kill only where things had so come to a head that any further delay would have meant one's own death, and this is neatly captured in the criterion of "*mortis proximum*" cited by several writers (eg Hume, 1, 224; Alison, 1, 20). Given this, one can well understand how the authorities were in most cases ill-disposed to putative self-defence, and indeed it is submitted that in earlier times the term "reasonable error" was almost a contradiction in terms for the

Scots law of private self-defence. If *mortis proximum* was at issue, then there could hardly be room for error as to the sword about to be thrust at one's throat. Error would creep in where the danger was not so imminent. Therefore, in a sense it was not so much the error to which the law objected, but the fact that this indicated that action had been taken before one had reached the final desperate stage of danger demanded by the law. This finds justification in the references to "precipitate measures" and "hasty opinion" by the writers. It also explains the requirements of "reasonable apprehension ... well-grounded in the circumstances of the situation" (Hume, 1, 224); "just apprehension" (Alison, 1, 102); "well-grounded fear" (Anderson 147-8) etc. It is in this context that one may interpret the decision in Captain John Price and others, and against this background that Lord MacKay's charge to the jury in Owens v H.M.A. must be viewed.

As a final point, one may predict that in any jurisdiction, a consequence of the relaxation of the rules regarding imminence would result in an increase in the number of cases where a defence of reasonable error of fact was allowed.

41. B.C. no 155 (Piquet).

42. D.1948.550.

43. L.79-90.148.

44. Again the quasi-objective 'circumstantial' approach is boldly displayed: "*Attendu que la fuite de G... et son attitude lorsqu'il eut été rejoint, telle qu'elle est décrite par D... étaient de nature à faire concevoir à ce dernier les pires craintes en raison du lieu et de l'heure et du fait que les deux hommes se trouvaient à ce moment-là seuls face à face ...*" (p550). See also Cr 11 janvier 1951 JCP.1951.IV.33 (Philippe), where the *Cour de cassation* annulled a decision convicting of *coups et blessures* the owner of a stolen car who had chased after it, and struck one of the occupants when he caught up with it. The lower court had failed to advert to the accused's claim that he had acted in self-defence on seeing the 'victim' reach towards his pocket.

45. See also Paris 9 octobre 1978 JCP.1979.2.19232, note Bouzat, Sencier); c.p. Montpellier 12 février 1947 D.1947.S.22. While the facts of the latter case are not entirely clear from the limited report, it does appear, as Professors Merle and Vitu remark (*Traité de Droit Criminel*, 4ème éd. Vol. 1 p512 note 1) that in rejecting the appellant's plea, the Court confused the issue of error as to one's victim with error as to the intentions of the victim.

46. Légal, A., RSC 1955 312, 314.

47. C.f. Le Sellyer, A.-F., *Traité de la Criminalité, de la Pénalité et de la Responsabilité*, (Paris 1874), Vol. 1 p261; Lablanche, M., *La Légitime Défense*, thèse, (Paris 1909), p62: "L'erreur d'une personne ne peut, en effet, en priver une autre de la garantie de la loi". See also Pufendorf, *Le Droit de la Nature et Des Gens* (tr. Barbeyrac) Basle 1771, Vol.1, II, Ch. 5, §V, p.290. C.f. Smith, J.C. and Hogan, B., *Criminal Law*, 5th ed. (London, 1983) 328. Cp. R v Browne (1973) *MLR* 96, per Lowry, *LCJ* at 109-110. When, on January 14th 1983, police in London shot

Stephen Waldorf as he sat in his car in the middle of traffic, mistaking him for a dangerous criminal, they were labouring under an error of fact - Mr. Waldorf had the right to act in self-defence, though in the circumstances he never had the chance to avail himself of this right. Likewise in the case of Moya, an affair which aroused great public interest. There, it appeared that the accused, who was under police surveillance as a suspect in a major theft (for which he was subsequently convicted) killed an undercover policeman, P.C. John Fordham, who, dressed in military-style combat gear, jumped out in front of him from behind some undergrowth as the accused searched his estate with a dog, believing there were intruders in his grounds. The jury acquitted him on a charge of murder. If the verdict proceeded on the grounds of putative self-defence then, however tragic the circumstances, it was, in the writer's opinion, justified in principle. See *The Times* 13th December 1985. For an interesting analysis of the collision of 'real' and 'putative' private defence, and his criticism of the American Law Institute's Model Penal Code on this issue, see Fletcher, G.P., *Rethinking the Criminal Law*, Boston, Toronto (1978) p766.

48. E.g. Gordon, *supra* p761; R v Wardrope 1960 Crim.L.R. 770 - all the more questionable in this instance as the case involved an alleged drunken belief in the need for force in self-defence, as to which, see *infra*.
49. Hawkins, *A Treatise of the Pleas of the Crown* (1716) Book 1, Ch. 28, p73: "it seemeth that he may justifie the Fact, inasmuch as it hath not the Appearance of a Fault."; Stephen, Sir James F., *A General View of the Criminal Law of England*, 2nd ed., London (1890), p124; Alison, *supra*, 1, 139. East seems to have been most alert to the juridical niceties of this issue. Quoting Hawkins's use of the term "justify", he remarks: "Perhaps it is more properly excusable" (East, E.H., *A Treatise of the Pleas of the Crown*, (London 1803) Vol 1, p275).
50. E.g. Garçon, *Code Pénal Annoté*, 2ème éd. (Patin, M., Rousselet, M., et Ancel, M., éds.), *supra*, Article 328, no.66, though not directly in point; Merle et Vitu, *supra*, Vol 1 p511.
51. E.g. T.C. Lyon 16 juillet 1948 D.1948.550; Cr 14 février 1957 B.C. no. 155 (Piquet).
52. Unlike the *Police Nationale*, which is under the direction of the Ministry of the Interior, the *Gendarmerie* falls under military authority and is governed by military administration.
53. Cr 30 octobre 1984 L.83-93.692 (D... et D...).
54. Though perhaps even this supposition may be questioned. Whether he uttered his threats on the mere fact of seeing the Sergeant-Major, or whether it was because he noticed the weapon, we do not know. The answer is of no small interest in our analysis.
55. One of the few to consider the issues raised in the case was Gèze, writing in 1904 (Gèze, H., *De la Légitime Défense et de ses Rapports avec la Provocation*, thèse, Toulouse 1904). At p126 he postulates an example remarkably similar on its facts. His tentative analysis is that this would be a case of "reciprocal private defence". In practical

terms it is hard to fault this, but in juridical terms it must surely be that a beginning to the altercation is identified somewhere.

56. See *infra*.

57. Quaere, if X goes to a bank with a toy (or even an unloaded) pistol and presents it at Y with the intent to rob - a perfectly plausible scenario. If Y shoots him dead, is he merely excused? Arguably not. H is acting in the reasonable belief of danger, and X would, it is submitted, be guilty of murder in the event that he somehow managed to intervene and kill the bank-teller to save his own skin. This then suggests a more complex model than first thought of, and it is submitted that the distinction lies in the element of bad faith on the part of X, who is not an entirely passive and innocent actor. The consequences of his (criminal) act follow so naturally and foreseeably that he is surely responsible in law. There is, then, in such cases, a point of no return, where, despite the error of fact - and assuming no chance of temporising or disengagement on the part of the attacker - the defender is justified and may not in law be thwarted by the other party. Compare the issue of defender-precipitated attack, *infra*.

58. See e.g. *R v Rose supra*; Paris 9 octobre 1978 supra, (Sencier).

59. The issue of self-defence does not require to be raised in a separate question for the consideration of the jury in their deliberations, for which a separate answer would be needed. The rationale is that as it is a plea in justification, it is inextricably linked with, and contained in, the response to the key question of culpability. On the other hand, excuses do require a separate question to be posed. In theory, this would presumably apply were the issue of putative defence to be viewed as juridically quite separate from Article 328, thus complicating the issue where it was not clear whether, strictly speaking, the belief was correct or not.

60. There is a tendency in much of the caselaw to speak of a belief being honestly held - this applies just as much to those which demanded reasonableness as any others e.g. Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975) 1976 * All ER 937, per Lord Diplock at 946; *R v Redman* (1978) VR 178, per Kaye, J. at 178; *R v Fennell* (1970) 3 All ER 215, per Widgery, LJ at 217; See also *R v Gladstone Williams* (1984) 78 CAR 276, per LCJ Lane at 281: "... if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected." Clearly, this last statement is flawed - the word "honestly" adds nothing, and indeed detracts from the point being made. A belief is either held or it is not, and in theory the inclusion of such additional terms tells us nothing. As the recorder in *Williams* said: "one could use all sorts of adjectives before the word 'belief' but I am not sure they add very much" (cited LCJ Lane at 288). However, it is perhaps useful to employ such terms when charging a jury, and their frequent use in judgements no doubt testifies to their linguistic attraction.

61. There is, however, confusion on the part of writers as to what the term "putative defence" refers to, some saying that it means reasonable belief, others using it when speaking precisely of an unreasonable

belief. Compare Pradel, J. et Varinard, A., *Les Grands Arrêts du Droit Criminel*, Vol 1, Paris 1982, p206, and Decocq, A., *supra*, p319 with Merle et Vitu, *supra*, p511 and Delmas-St. Hilaire, J.P., *Jurisclasser Pénal, Faits Justificatifs* no 108.

62. B.C. no 423.

63. We see clearly again the quasi-objective control of the courts over the evaluation of self-defence, referred to above. It seems that such decisions do render pious the belief of some authors that in such instances the good faith of an accused will stand him in good stead. See eg Merle et Vitu, *supra*, p512; Delmas-St. Hilaire, *Jurisclasser Pénal, supra* no.108.

64. B.C. no. 338.

65. C.f. Cr 5 novembre 1976 L.76-90.538 (époux Sabourault) and Cr 18 octobre 1983 L.83-90.831 (T...).

66. Within this context one may cite the famous decision of the Tribunal Correctionnel de la Seine of 25 octobre 1955 GP.1956.1.28 (Tsango c Barba, Chaussen). The case concerned a wrestler tried for striking a spectator who had approached him after he fell from the ring. The decision has been heavily criticised in some quarters as an unrepresentative example of an unreasonable belief providing a defence in French law. Now, while it is true that the curious and flawed 'motivation' of the judgement may be produced to support such a view, it is submitted that it is in reality no more than an example of weak judicial reasoning towards a justifiable verdict. For was it really an unreasonable belief? The wrestler had twice previously been thrown from the ring and on both occasions had been punched and kicked by the spectators at whose feet he fell. Given these circumstances, it is submitted that the decision is nothing more than a good example of the 'circumstantial' approach being adopted by the court. For it seems difficult to class as unreasonable the belief on the part of the wrestler that he was about to be struck again. Indeed, the court's judgement that "*il y a lieu de tenir compte de l'ambiance et de l'atmosphère dans lesquelles de pareilles manifestations se déroulent*" surely confirms this interpretation of the case. See too, Hugueney, L. RSC 1956 325.

67. See eg Reference under section 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975) (1976) 2 All ER 937, per Lord Diplock at 946; *R v Fennell* (1970) 3 All ER 215; *R v Rose* (1884) 15 Cox CC 540; *R v Chisam* (1963) 47 CAR 130; *Townley v Rushforth* Times December 5 1963, (1964) Crim.L.R. 590; *R v Weston* (1879) 14 Cox CC 346; c.f. *Owens v H.M.A.* (1946) JC 119. See however, *R v Wardrope* (1960) Crim.L.R. 770 and *R v Gamlen* 1 F & F 90 (both of which concerned drunkenness and a belief in danger).

68. (1981) 1 All ER 628.
69. See especially pp639-70. Their Lordships felt that they were bound to decide as they did according to authority; but their wish for a change in the law was ill-concealed. Any such change, however, had to come from the legislature, it was felt, and not from the courts.
70. It must be pointed out, though that while the appeal to the House of Lords was rejected, this proceeded on entirely different grounds from those discussed in the lower court [(1981) 3 All ER (HL) 878]. Indeed, their Lordships made clear that they felt it improper to engage in an examination of the principle discussed in *Hodgson, J's* judgment. One may only hypothesise as to what was in their minds; this course of action was, juridically speaking, perfectly proper; but bearing in mind the dicta from the House in *D.P.P. v Morgan* (1975) 2 All ER (HL) 347, it is submitted that behind their silence lay an understandable reluctance to enter the difficult undergrowth of the *Morgan* debate, rather than outright disapproval of the decision of the Divisional Court.
71. Lord Chief Justice Lane, Skinner, J., and McCowan, J.
72. (1984) 78 CAR 276; (1984) Crim. L.R. 163.
73. (1984) 78 CAR 276, 281.
74. *Id.* at 281: "If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held, and should be rejected." See also Françon, A., *L'Erreur en droit pénal*, *supra* p227, at pp234-5.
75. (1981) 1 All ER 628, *supra*.
76. (1983) 77 CAR 225; (1983) 1 WLR 1118.
77. (1976) AC 182; (1975) 61 CAR 136.
78. (1984) 78 CAR 276; (1984) Crim. L.R. 163.
79. See eg Williams, G., *Textbook*, *supra*, p138.
80. In homicide cases, it would follow that a conviction for murder would result in cases where at most the accused was guilty of gross negligence and therefore of manslaughter only; while in other cases, a conviction for assault would follow, where negligence does not suffice in the definition of the offence. See eg Smith and Hogan, *Criminal Law*, *supra* especially 77-8 and 329-30; Williams, *Textbook*, *supra*, 137-8.
81. Williams, *Textbook*, 138.
82. *R v Jackson* (1985) RTR 257; the proviso to s.2(1) of the Criminal Appeal Act 1968 was applied.
83. See eg Williams, *Criminal Law - The General Part*, *supra*, especially pp.206-213; Smith & Hogan, *supra*, 76 et seq., 329-30; *Criminal Law*

Revision Committee, *Fourteenth Report - Offences against the Person* Cmnd.7844, Part VII, Para. 283; Law Commission Report No. 143 - *Codification of the Criminal Law* (H.C. 270 - 1985) Clause 47.

84. See the judgments of Lord Hailsham (especially at 361-2) and Lord Cross (especially at 352).

85. It was precisely this distinction between the definitional elements of an offence, and matters of defence, that induced the Divisional Court in Albert v Lavin to reject the appeal. See especially pp. 634-7 of (1981) 1 All ER 628, per Hodgson, J.

86. *Supra*, per Lord Hailsham at 361; Lord Simon at 366. See further the words of Lord Simon (p, speaking of self-defence in his dissenting judgment: "... it is clear law that, in order to establish a defence in such circumstances, (the accused's) belief must be based on reasonable grounds."

However, see Ashworth, A., *(Self-Defence and the Right to Life* (1975) CLJ 282, 304 footnote 80), who considers that Morgan weakened the case for demanding reasonableness.

87. (1981) 1 All ER 628, 639.

88. Contrast for example the question of theft, with the element of unlawful appropriation and the intention to do so without the owner's consent. Now, this issue of the absence of consent is clearly an element of the offence. In private defence one is accused, say, of murder, and in forwarding this plea one is importing an extra element to "destroy" the offence which, *prima facie*, has been constituted; a plea in justification. If, however, a person charged with theft provides evidence of consent on the part of the owner of the property in question, this is *not* a plea in justification, nor is it a defence. It is simply a demonstration that the offence has never been constituted in the first place.

89. Implicit therefore, in the present writer's stance, is the notion that private defence in no way negates *mens rea*; see for example the trial judge in Palmer v Reginam (1971) 1 All ER 1077, quoted at 1081 (speaking of intent). *Contra*: Turner v Metro-Goldwyn-Mayer Pictures Ltd. (1950) 1 All ER 449, per Lord Oaksey at 470-1; Hillan v H.M.A. (1937) JC 53 per L. MacKay at 62, c.f. L.J.-C. Aitchison at 59; compare Alison, *supra*, 126 with 165. Indeed, it is submitted that whether one views private defence as an element of the offence or of the defence, this remains unchanged, and private defence is an element quite separate from both the *actus reus* or the *mens rea*. Interestingly, though, in one of the few express statements on the matter, the *Cour de cassation* in Cr 23 juin 1887 B.C. no.237 (Cazalets et Pescetti) stated: "*Attendu que les faits ainsi exposés par la Cour de Bastia sont exclusifs de l'intention homicide...*"

90. Citing R v Kimber (1983) 77 CAR 225; (1983) 1 WLR 1118.

91. Griew rejects such reasoning as "unprincipled". Griew, E., (1977) Crim. L.R. 91, 99.

92. A principle which we shall examine in the following chapters.
93. In *R v Gamlen* (1858) 1 F & F 90 Crowder, J. told the jury: "Drunkenness is no excuse for crime: but in considering whether the prisoner apprehended an assault on himself you may take into account the state in which he was." also *R v Wardrope* (1960) Crim. L.R. 770, and the cases cited by Williams, G., *Criminal Law - The General Part* 2nd ed. (London 1961) p208 footnote 7.
94. This highlights well the issue of just how much circumspection one should demand from third parties intervening in disputes, a point which has aroused much debate in the United States in particular.
95. (1984) 78 CAR 276, 277.
96. No doubt the unwillingness of judges and academics to develop the point very far in illustrative terms, is related to the fact that the question of reasonableness in this context must be a question of fact - but where legal principles directly relevant to the disposal of an accused are concerned, one must surely be aware of the factual context in which they are supposed to operate. It is this "factual context" which appears to be so conspicuously absent.
97. It is important to note that the Court did not suggest adoption of the recommendations in the Criminal Law Revision Committee's *Report on Offences Against the Person* (Cmd. 7844) which argued for a statutory defence based on unreasonable belief. For the Court's view was that this already was an accurate description of the common law. The CLRC's recommendation clearly shows that their examination of the common law indicated to them that this was not so.
98. See e.g. *R v Rose* (1884) 15 Cox 540.
99. *Criminal Law*, *supra* 330. But it should be pointed out that the writers were arguing as much from principle as practice. See also Williams, G., *The General Part*, *supra*, 208.
100. All the more savage in 1884, when an accused risked his neck. See *R v Rose* *supra*.
101. E.g. *R v Weston* (1879) 14 Cox 346.
102. Hume, 1, 224; Alison, 1, 102; MacDonald, 106, citing Hume,; Anderson, A.M., *the Criminal Law of Scotland*, 2nd ed. (Edinburgh 1904) pp. 147-8; Dunedin, Viscount, ed. *Encyclopædia of the Laws of Scotland*, Vol. V para. 288, citing *John Forrest* (1837) 1 Swin. 404, at pp. 418, 420; Gordon, *Criminal Law of Scotland*, *supra*, 761. See also *Owens v H.M.A.* (1946) JC 119.
103. *Neek & Others v H.M.A.* (1982) SCCR 613.
104. See *Captain John Price and others* November 26th 1690, cited Hume, 1, 224.
105. L.76-90.527.

106. The term is used loosely - in both England and Scotland the burden of proof in relation to private defence lies squarely on the Crown - Chan Kau v R (1955) AC 205; R v Lobell (1957) 1 All ER 734; Bharat v R (1959) Crim.L.R. 786; R v Wheeler (1967) 1 WLR 1531; R v Julien (1969) 2 All ER 856; R v Wright (1971) Crim.L.R. 477; R v Abraham (1973) 3 All ER 694, per Edmund Davies, LJ at 697: "... it is for the Crown to destroy self-defence."; Lambie v H.M.A. (1973) SLT 219

On the other hand, the term is quite appropriate for French law, for the general opinion there is that the burden lies with the accused, at least so far as A328 private defence is concerned - Merle et Vitu, *supra*, p519; Soyer, *supra*, 118; Delmas-St.Hilaire, J.-P., *Jurisclasser*, *supra*, no. 144; Légal, A., RSC 1955 313, 314; Cr 3 mai 1979 L.78-91.194 (Boullet); Cr 23 mars 1981 L.80-93.648 (Grabowski); Cr 14 mars 1984 L.81-90.782 (S...); Cr 3 juillet 1984 L.83-91.401 (A...); Cr 12 août 1974 L.74-90.277 (de Marcos); c.f. Cr 13 novembre 1975 L.75-90.123 (Amram). Contra, Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, p353 c.f. Stéfani, Levasseur et Bouloc, *Procédure Pénale*, *supra*, pp34-35.

107. The present writer cannot, therefore, agree with Doyen Bouzat's assertion that "*rien n'interdit de préméditer sa légitime défense; ce qui est interdit seulement, c'est de frapper le premier.*"
108. Hale, P.C., 484; East, P.C. Vol 1 (1803) p273; Stephen, Sir James, F., *Digest* *supra* p252.; Archbold, *Pleading, Evidence and Practice in Criminal Cases* 41st ed. (Mitchell, S., ed.) London, 1982 pp1405, 1451; Kenny, *Outlines of Criminal Law*, 19th ed. (Turner, J.W.C., ed.) Cambridge 1966, p207; Russell on Crime, 12th ed. (Turner, J.W.C., ed), Vol 1, London 1964, pp436-7, 681; R v Rose (1884) 15 Cox 540, per Lopes, J at 541; R v Symondson (1896) 60 JP 645; R v Carman Deana (1909) 2 CAR 75; R v Chisam (1963) 47 CAR 129 at 134; Devlin v Armstrong (1971) NI 13, per Lord MacDermott LCJ at 33; R v Fegan (1972) NI 80, per MacDermott, LJ (djc) at 88; Viro v R (1976-78) 141 CLR at 143; R v Redman (1978) VR 178; Hume, 1, 224; Burnett, 40; Alison, 1, 20 and 132; Anderson, *supra*, 18; MacDonald, *supra*, 106; John Forrest (1837) 1 Swin. 404, per Lord Moncrieff at 418; H.M.A. v Kizileviczius (1938) JC 60, per Lord Jamieson at 62; Owens v H.M.A. (1946) JC 119, per Lord Justice-General Normand at 125; H.M.A. v Doherty (1954) JC 1, per Lord Kieth at 4; Fenning v H.M.A. (1985) SCCR 219,, per Lord Mayfield (trial judge), quoted at 220; Garçon, *supra*, A328 no.69; Lablancherie, M., *La Légitime Défense*, thèse, (Bordeaux 1909) p63; Gèze, H., *De la Légitime Défense et de ses rapports avec la Provocation*, thèse (Toulouse 1904) p89; Sieurac, F., *La Légitime Défense*, thèse (Toulouse 1896) p66. See also the report by Monseignat, cited by Locré, Vol XXX p513, and Nuyart de Vouglans, *Institutes*, *supra*, Pt. I, Ch 1, p9; Serpillon, *Code Criminel*, *supra*, Tit. XVI, Art. II, p758; Jousse, *Traité de la Justice Criminelle*, *supra*, Pt.IV, Tit.XXI, Art.VI, no.60, p506; no.63, p507.; Cr 27 juin 1927 S.1929.1.356 (Maurras); Tribunal Correctionnel de Lyon 16 juillet 1948 D.1948.550 (G. c D.); Cour d'appel d'Alger 9 novembre 1953 D.1954.369 (M.P. et Bussutil c Zeghoudi); Cr 14 février 1957 B.C. no.155 (Piquet); Nancy 9 mars 1979 GP.1979.655, note P.-L.G.; D.1981.J.462, note Bernardini (Bastien); Cr 13 décembre 1973 L.73-90.226 (Debrossard); Cr 6 mai 1975 L.74-92.573 (Di Mascio); Cr 6 novembre 1975 L.74-92.087 (Danilo); Cr 22 mai 1978 L.76-91.343 (Collin); Cr 25 février 1981 L.80-91.178 (Odot); Cr 16 juin 1982 L.81-90.829 (B...); Cr 18 octobre 1983 L.83-90.831 (T...).

109. "(La légitime défense) n'est autorisée que pour repousser un mal présent, car c'est alors seulement qu'elle devient nécessaire" - Cr 27 juin 1927 S.1929.1.356 (Maurras). Professors Merle and Vitu also point (*Traité, supra*, Vol 1 p510) to the fact that imminence is derived from the legal requirement of necessity.
110. (1884) 15 Cox 540.
111. L.75-92.395; c.f. eg Cr 20 avril 1982 JCP.1983.II.19958 (Vve. Diab et autre).
112. For just two illustrative examples out of many, see Cr 23 juin 1980 L.79-93.511 (Goussegal) and Cr 1 février 1984 L.83-90.825 (V...). While the latter offers a good illustration of judicial thought on the point of differentiated response, the writer would very much question the court's decision on the facts before it, particularly in light of the fact that the case appeared to involve, in the eyes of the court, a serious attack upon a dwelling (as to which see, *infra*, Chapter 4).
113. E.g. Tribunal Civil de Strasbourg 10 mars 1953 JCP.1953.II.7855, note Alexandre (*Dame Tronchère c Andrès*).
114. Eg Nancy 15 juillet 1925 D.1926.2.23 (Dalboy c M.P.); Cr 7 décembre 1971 B.C. no338 (Pesleux).
115. D.1901.1.373.
116. See also Cr 18 octobre 1983 L.83-90.831 (T...) (lower court): "... il est néanmoins certain que l'attitude menaçante des deux victimes n'était nullement de nature à exposer T... à un danger suffisamment imminent et sérieux (pour justifier sa réaction contre) Rafa et Berger, dont les intentions sont restées sans aucun commencement d'exécution." It is submitted that this requirement was lacking in the case of Tribunal de Police de Valence 19 mai 1960 (S.1960.1.270, note Hugueney (*Epoux Y et Dame X*), which we shall examine later in this chapter. The court there, however, found the plea of private defence made out.
117. (1950) JC 67.
118. *Ibid.* at 71-72.
119. See Burnett, *supra*, 54, and East, *PC, supra*, 272. Both writers address the issue of someone lying in wait to attack another. Even there, they state that one could not kill. See also Gordon, *supra*, 759.
120. East, *PC*, 272.
121. See for example, the issue of retreat from an attacker, *infra*.
122. Garçon, *supra*, A328, nos 68, 110; Stéfani, Levasseur et Bouloc, *Droit Pénal Général, supra*, p348; Merle et Vitu, *Traité, supra*, p510; Bouzat, P, et Pinatel, J., *supra*, Vol 1, p361; Delmas-St. Hilaire, J.-P., *Jurisclasser Pénal, Faits Justificatifs, supra*, no. 120; Soyer, J.-C., *Droit Pénal et Procédure Pénale, supra*, 118; Fuzier-Herman, *Répertoire Général Alphabétique du Droit Français*, Vol. 26 1898, *La Légitime Défense*, no.29; Lablanche, M. *La Légitime Défense, supra*, 63-64; Gèze,

H., *De la Légitime Défense et de ses Rapports avec la provocation*, supra, 91; Sieurac, F., *la Légitime Défense*, supra, 67. See also Jousse, supra, Pt. IV, Tit.XXI, Art.VI, no62, p507; Pufendorf, *le Droit de la Nature et des Gens*, supra, II, Ch.V, §IV, p289 and §§VII-VIII, pp293-5; cp. Grotius, *le Droit de La Guerre et de La Paix*, supra, II, Ch.I, §v, no1, p210 against no.2 pp211-12, specifically criticised by Pufendorf. But although Grotius's view is not entirely clear, it does seem he demands an overt act, and there are grounds for thinking that Pufendorf has misinterpreted his words - see Pufendorf, supra, p294, footnote 3.

123. See e.g. Cr 27 juin 1927 S.1929.1.356 (Maurras). Different however, is the case of a conditional treat, such as in robbery. There, one may treat the danger as imminent, and the fact that by complying with the unlawful demand one might avoid the danger (a questionable proposition in itself) in no way detracts from the right to defensive force. See *infra*, Chapter 4.
124. *Pro Tullio*, cited by Le Sellyer, supra pp264-5. Interestingly, Garçon (A328 no.110) thinks that regarding lesser offences the principle of preventive action might operate. Thus, for example, one might steal the weapon of someone whom one feared was preparing an attack. The present writer fully agrees with this proposition. As the gravity of avoiding action diminishes, so too should the temporal restrictions which accompany it in the law. The balancing of values in such instances surely shifts slightly in favour of the potential victim, given that the risk involved (of erroneous belief of attack etc.) is less grave in its consequences, and more easily tolerated in policy terms.
125. On 28th January 1978, at the Prison of Clairvaux in France, in the course of a foiled escape attempt, two prisoners, one of whom was armed, took three people hostage and held them in a cell. In the subsequent siege, members of the Groupe d'Intervention de la Gendarmerie Nationale (GIGN - the élite tactical intervention force) were called, and snipers from the squad trained their rifles on the window of the cell for over an hour, until both men appeared simultaneously within their sights and were shot dead. Although there was no outright attack upon the hostages at that particular moment, there can be little doubt that the officers acted, at the very least, in private defence. Furthermore, in the writer's opinion, homicidal force may, in principle, be used where necessary to terminate the mere fact of a kidnapping *tout court*, irrespective of the issue of imminent and serious bodily injury.
126. *Textbook*, supra, 503.
127. (1976) 2 All ER 937, 946.
128. *Textbook*, supra, 504 footnote 5.
129. Thus Le Sellyer, (*Traité*, supra, p265) believes that there is some room for 'preventive' action, but clearly linked to a particular threat. He argues that the provisions of private defence "*peuvent, cependant, dans leur généralité, comprendre même le cas de la nécessité ACTUELLE de la légitime défense contre un danger qui n'est pas encore déclaré, mais qui*

va l'être." (original emphases). This position, it is submitted, merits approval.

130. Ryana v Hughes (1972) 3 All ER 412; R v Fegan (1972) NI 80; c.f. e.g. John Forrest (1837) 1 Swin 404; Tribunal correctionnel d'Ambert 5 juin 1956 D.1957.S.53, G.P. 5-7 septembre 1956 (Malcurat c Convert); Garçon, *supra*, A328 nos.98-99
131. (1984) 1 All ER 988.
132. See LCJ Lane, delivering judgement of the court at 993: "In our judgement a defendant is not left in the paradoxical position of being able to justify acts carried out in self-defence but not acts immediately preparatory to it ... He is not confined for his remedy to calling on the police or boarding up his premises."
133. See R v Cousins (1982) 2 All ER 115. Compare Cr 27 juin 1927 S.1929.1.356 (Maurras). However, in rejecting the accused's *pourvoi* against conviction, the *Cour de cassation* appears to have totally confused the acts threatened with the threats themselves. There is no reason why one might not threaten force in anticipation of an attack. The facts of the case were, it has to be said, hardly in the accused's favour.
134. *Infra*, Chapter 4.
135. Stephen, *New Commentaries*, *supra*, p105; East, *PC*, 293; Archbold, *Pleading, Evidence and Practice*, *supra*, p.1406; Russell on Crime, p439; Blackstone, *Commentaries*, *supra*, 185; Hume, '1, 228; Alison, 1, 104; Burnett, 43; *Encyclopædia of the Laws of Scotland*, Viscount Dunedin, ed., *supra*, para.276; Garçon, *supra*, A328 no.70; Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, *supra*, Vol 1, pp360-1; Merle et Vitu, *Traité*, *supra*, Vol. 1, 510; Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, p348; Levasseur, G., RSC 1971, 420.

Consider, though, the case of rape. Mere penetration suffices to complete the *actus reus* of this offence. But clearly it would be nonsense to suggest that the woman may not use force against her attacker once he has achieved this. Here, one may view the offence as continuing, or in the alternative (for the purposes of private defence) as comprising a series of repeated rapes. The former analysis is perhaps preferable.

136. See for example, R v Harding and Carter (1972) Crim. L.R. 256. And see the remarkable case reported by Alimena, *I limiti e i modificatori dell'imputabilità*, Vol. III, p47 (Torino 1899), cited by Gèze, H. *De la Légitime Défense et de ses rapports avec la provocation*, *supra*, p9.
137. It is, though, possible for there to be a coincidence of revenge and private defence. One may harbour a great grudge against another, and subsequently find oneself the object of an attack by him. But so long as the basic requirements of private defence are made out, the fact that one may perhaps take great pleasure in using defensive force is of no relevance, and in no way detracts from one's defensive right. On this point, see R v McKay (1957) VR 560, per Lowe, J at 564-5.

138. (1841) Car & M. 241.

139. C.f. eg Cr 16 octobre 1979 D.1980.IR. 522, obs. Puech (Ripault).

140. See eg R v Hawgridge (1707) 84 ER 1107; Paris 2 décembre 1967 JCP.1968.II.15408, Note D.S., and see Levasseur, G., RSC 1968.334.

141. See *infra*.

142. See Hume, 1, 333-4. Having first stated that provocation may not be a justification of assault, he then says that "the defence of provocation by real injuries suffered in the person is subject to a different construction, and may not only mitigate the sentence, but amount to an entire justification." Also MacDonald, *supra*, 116; Anderson, *supra* 159; c.f. Alison, 1, 177.

The most obvious example of judicial confusion on this matter is found in Hillan v H.M.A. (1937) JC 53, especially per Lord Justice-Clerk Aitchison at 57-8, and Lord McKay at 61-2, where it was stated that both provocation and self-defence could result in either acquittal or a reduction in the quality of the crime. Furthermore, while treating them as different concepts, the Court described them in such a way as to make them virtually indistinct, compounding the error as to the juridical effect of both pleas. Given this, it is difficult to agree with Lord McKay's description (p61) of Hume's analysis as "a wonderfully clear and full exposition of the law." See also H.M.A. v Kizileviczius 1938 JC 60, per Lord Jamieson at 63.

Hillan was heavily criticised in the later case of Crawford v H.M.A. (195) JC 67, especially by Lord Justice-General Cooper (p69): "Provocation and self-defence are often coupled in a special defence, and often I fear confused; but provocation is not a special defence and is always available to an accused person without a special plea. The facts relied upon to support a plea of self-defence usually contain a strong element of provocation, and the lesser plea may succeed where the greater fails; but when in such a case murder is reduced to culpable homicide, or a person accused of assault is found guilty subject to provocation, it is not the special defence which is sustained but the plea of provocation." Similarly, in H.M.A. v Doherty (1954) JC 1, Lord Keith drew a clear distinction between the two pleas. See now Fenning v H.M.A. (1985) SCCR 219, per Lord Cameron at 223-4. Though characteristic of Scots law, this confusion has not been confined to that jurisdiction; see Haddleton v Holwerda 1956 Crim. L.R. 409.

The two pleas are interlinked in a second way, in that regarding homicide cases, the plea of provocation has been assimilated with the plea of "excessive defence", which is accepted in some jurisdictions, and operates where an accused has gone beyond the bounds of private defence in his actions. While there is perhaps greater excuse for confusing provocation with such a qualified 'defensive' plea, since both may lead to a similar reduction from murder, the two concepts are nonetheless juridically distinct (see *infra*, Chapter 6).

143. See eg Garçon, *supra*, A321 no.8; Levasseur, G., RSC 1968, 334 at 335 and authorities cited therein.

144. Cf. Roux, J.A., note to Cr 12 décembre 1929 8.1931.I.113.
145. (1954) JC 1 at 4. Also, Alison, 1, 177, and see Gordon, *Criminal Law of Scotland*, *supra*, p761.
146. *New Commentaries on the Laws of England* *supra*, Vol.IV (1845) p105.
147. *Treatise*, *supra* 43. He was, it should be noted, discussing self-defence on a sudden quarrel, rather than on a sudden, felonious and unilateral surprise attack, but it does appear in any case that whatever the precise status in the law of the felony-quarrel distinction, the latter situation is the one most representative of day-to-day caselaw. The *Encyclopædia of the Laws of Scotland* (Viscount Dunedin, ed.), *supra*, states (para. 276) that it would be culpable homicide, and seems to have the support of Alison (1, 104), although the outcome must depend on the particular circumstances of each case.
148. (1979) Crim. L.R. 310.
149. Curiously, though, the report in the Criminal Law Review tells us that the Court reasoned that by virtue of the victim's retreat, the defendant had had every means of retreat open to him. But this is surely to miss the point. On the facts in the report, there was no (longer any) attack, and so the issue of retreat by the victim may be viewed as irrelevant.

The Scots case of John Symons (1810) (see Hume, 1 228) merits some attention. There, the accused had been attacked and severely beaten without provocation in the street by the deceased who then ran off when Symons drew his sword. However, the latter gave chase for some fifty yards or so and ran him through, killing him. He pleaded, *inter alia*, self-defence and was acquitted, a decision which Hume approved. However, it is not entirely clear that self-defence explained the verdict (see Burnett 45) and indeed it is difficult to see how the plea could be sustained. Hume does seem to view the case as one of self-defence against a felon, but this is doubted by both Burnett (45) and Alison (1, 104), the former specifically doubting whether he could have had reasonable apprehension of a renewed assault; and pointing to the flight of the deceased and the fact that the killing took place *ex intervallo*. Whatever the correct opinion, Symons certainly runs against the whole tenor of modern statements on the law.

150. L.84-90.373.
151. L.81-90.829.
152. Cr 3 juillet 1984 L.83-91.401 (A...).
153. Cr 17 mars 1976 L.75-91.389 (Coste). Indeed, it was not clear that the victim had, at any time, been a true attacker.
154. Cr 4 juillet 1907 B.C. no.293 (Chevalier de Coutans). See also Bourges 30 novembre 1950 D.1951.66 (Meuilly c Boisgontier); Cr 8 juillet 1942 B.C. no.88 (Pasquier); Cr 1 février 1972 L.71-92.098 (Jouot); Cr 6 juillet 1976 L.76-90.002 (Resgnier) cp. Cour d'appel de Dijon 8 janvier

1965 GP.1965.I.155 (Arcelin et Jacquin), where the incident in question took place within the special context of a night-attack.

155. Estimates vary around the figure of fifteen million weapons, most of which are held illegally.
156. Note to Priestnall v Cornish (1979) Crim. L.R. 310.
157. S.1906.2.277; D.1906.5.38.
158. Cf. Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, supra, Vol. 1 p361. Compare counsel's fruitless submission in Cr 25 mai 1977 L.76-92.457 (Vamo), an argument not infrequently encountered in the case reports; namely that since the accused was not actually struck at the time he reacted, the supposed attack was then over.

Hawkins gives us an interesting example (Ch.28 pp.71-2) where he tells us that there might be justification when "a Servant coming suddenly and finding his Master robbed and slain, falls upon the Murderer immediately and kills him; for he does it in the Height of his Surprise, and under just Apprehensions of the like Attempt upon himself". His opinion does it seems rest on good authority - see Anonymous Lib.Ass. ann. 26, f.123, pl.23 (cited Kenny, *A Selection of Cases Illustrative of English Criminal Law*, 7th ed. (1928) pp.137-8. The issue of one attack legitimately provoking fears of another is of particular significance in the field of weapons offences. See for example R v Giles (1976) Crim. L.R. 253.

159. See Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 No.1 of 1975 (1976) 2 All ER (HL). C.f. Jousse, *Traité de la Justice Criminelle de France*, (Paris 1771), Pt. IV, Tit. XXI, Art.VI, no.79, p514.
160. E.g. Cr 27 novembre 1974 L.73-91.401 (Hamitouche) and Cr 6 juillet 1976 L.76-90.002 (Resgnier).
161. C.f. Cr 28 juillet 1975 GP.1975.2.713 (Leblanc).
162. See also Hume, i, 218. Even in defence against a felon, in which circumstances Hume took a particularly dim view of the attacker, and a correspondingly generous view as to the rights of the defender, he still observed that "if he kill the assailant after he is secured, or may probably be taken alive, it is at least a culpable homicide; nay, if there has been any interval for reflection, it may even amount to murder"
163. See eg Alison, i, 177, speaking of assault: "But, though fully justified in retaliating, the pannel must not carry his resentment such a length as to become the assailant in his turn ... In such cases the defence degenerates into an aggression...".
164. (1909) 2 CAR 75.
165. Specifically criticised were the following words of the Deputy-Chairman: "No-one has a right to return blow for blow, it is an Englishman's way of settling differences but it is not lawful, the

proper way to proceed being to take out a summons." C.p. Connorton v Annan (1981) SCCR 307.

166. Cr 13 décembre 1973 L.79-90.226 (Debrossard).

167. *Commentaries*, 1, 218. Admittedly, one may agree with Professor Gordon's view that Hume's exposition of the law relating to defence against a felon does not represent modern Scots law (see *Criminal Law of Scotland*, *supra*, pp.757-8 and MacDonald, *supra*, p106), but it is submitted that the neglect shown the words of Hume quoted here is due more to the absence of any case directly in point. Hume himself admitted that his sentiments did "not rest on any judgement of our Supreme Court", but it can hardly be doubted that he would have chosen just such a case as Debrossard to support his view.

168. See Cr 30 novembre 1977 L.77-91.700 (B... et autres). In this latter case the accused had found himself in a particularly dangerous position - during an affray, in the course of which all but one of his companions fled, he found himself facing a group of men, some armed with knives and a razor. He took a piece of wood and swung it round, striking his victim two blows, in the head then in the back, causing injuries from which the latter subsequently died. In the circumstances, it could hardly be said that the accused had acted beyond the necessities of the occasion.

169. GP.1937.2.386.

170. Magnol, RSC 1937, 682, 683.

171. (1945) 46 Crim. L.J. 736.

172. C.f. Cr 26 février 1980 L.79-93.246 (Abdelkaoui).

173. See *infra*, Chapter 2.

174. (1945) 46 Crim. L.J. 736.

175. D.1980.IR.522, obs. Puech.

176. L.71-92.098.

177. See the interesting case of Cr 4 juillet 1907 B.C. no.293 (Chevalier de Coutans) where the *Cour de cassation* annulled a verdict of the *Cour d'appel* de Bordeaux, which had left unclear whether the precise nature of the injuries which formed the basis of the particular offence for which he was convicted ("*coups et blessures volontaires ayant entraîné une incapacité de travail de plus de vingt jours*") was calculated solely from the bullets fired once the accused was no longer acting in true private defence, or whether (wrongly) all five bullets which had hit the victim, had been included in the calculation. See also the fascinating facts of Cr 26 février 1980 L.79-93.246 (Abdelkaoui).

178. For example, see Cr 4 juillet 1907 B.C. no.293 (Chevalier de Coutans).
179. *Supra*, p177.
180. Puech, M., commenting Cr 16 octobre, 1979 D.1980.IR.522 at 523 (Ripault).
181. D.1964.276.
182. Cass. Civ. 24 novembre 1965 D.1966.654.
183. D.1970.691.
184. "Dans le cas de crime flagrant ou de délit flagrant puni d'une peine d'emprisonnement, toute personne a qualité pour en appréhender l'auteur et le conduire devant l'officier de police judiciaire le plus proche." See also Douai 15 juin 1977 JCP.1979.2.19232 (Deprost); cp. Toulouse 15 novembre 1979 JCP.1981.2.19608 (M. c T.), convincingly criticised on the facts by Doyen Bouzat in the comment to the decision.
185. This has been repeated in various governmental and internal police circulars over recent years. See:

Circ. no. 413 du 28 juillet 1958 du Ministère de l'Intérieur.
Circ. no. 61 du 29 juillet 1962 du Ministère de l'Intérieur.
Circ. no. 2260 du 21 mai 1963 du Directeur Général de la Sûreté Nationale
Circ. no. 1584 du 3 juillet 1975 du Directeur Général de la Police Nationale.
Circ. no. 54-76 du 10 novembre 1976 du Directeur Général de la Police Municipale (Paris)

All are cited in Servoz et Montreuil, "L'Arme à Feu et Le Policier", *Revue Générale d'Etudes de la Police Française*, Juin 1977. The principle was reaffirmed most recently in Circ. no. 217 du 7 janvier 1983 du Directeur Central de la Sécurité Publique.
186. D.1964.276.
187. Article 174 of the décret du 20 mai 1903.
188. A right which the police enjoyed briefly during the Second World War and the Algerian War: see (a) the loi du 18 septembre 1943 which was declared invalid by the ordonnance du 31 mars 1945 (b) Ordonnance No. 58-1 309 du 23 décembre 1958, Articles 1 & 3, both cited in Servoz et Montreuil, "L'Arme à Feu et Le Policier", *Revue Générale d'Etudes de la Police Française*, Juin 1977, *supra*.
189. See Cr 1er décembre 1955 B.C. no.535; and see the astonishing words of the lower court in Cr 13 avril 1976 L.75-91.196 (Vve. Delabesse).
190. *Supra*.
191. Article 174 of the décret du 20 mai 1903, *supra*.
192. Cass. Civ. 24 novembre 1965 D.1966.654.

193. See Chapter 4.
194. Albert v Lavin (1981) 3 All ER 878; Tribunal de Police d'Ecouen 22 novembre 1972 JCP.1973.II.17447 (Montembault); Cr 9 février 1972 JCP.1972.Ed.G.IV.71; D.S..1972.S.80.; Cr 1er octobre 1979 B.C. no.263; D.1980.IR.334, obs. Puech, (Gilbert); Cr 12 mai 1980 L.79-93.585 (Fumat).
195. "The fact that the resistance may endanger the life of the attacker is irrelevant unless the resistance ceases to be justifiable." Gordon, *Criminal Law of Scotland*, supra, p750.
196. One way in which excuses differ from justifications.
197. "... the attack is a criminal one although the attacker is not punishable." - Gordon, *Criminal Law of Scotland*, supra, p751 footnote 6. For support for this theory, see eg Plunkett v Matchell (1958) Crim. L.R. 252; contra Garçon, supra, A328 no.96: "... l'agression d'un inconscient ne constitue elle-même aucun fait punissable ... ainsi elle n'est pas injuste".
198. See Gordon, supra, p751, footnote 6; Smith & Hogan, *Criminal Law*, supra, 328; Stephen, Sir James, F., *Digest*, supra, p254; Stephen, Sir James, F., *General View*, supra 121; Williams, G., *Textbook of Criminal Law*, supra, 502; Priolaud, supra, 64; Sieurac, supra, 48; Lablancherie, supra, 34, 58 (but only in the last resort); Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, supra, 350; Chauveau et Hélie, supra, Vol.4, 187; Merle et Vitu, supra, Vol.1, 515-6; Le Sellyer, supra, 261; Garçon, supra, A328 no.96; *Répertoire Général Alphabétique*, supra, *Légitime Défense*, no.70; Larguier, J, RSC 1975, 406, 406; c.f. Jousse, *Traité*, supra, Vol.III, Pt.IV, Tit.XXI, Art.VI, no.55, p504 (speaking also of a sleepwalker). Several of the above French writers also included other types of non-responsible persons, such as intoxicated attackers and minors.
199. Eg Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, supra, p350; Garçon supra, A328 no.96; Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, supra, Vol. 1, p.360. It is not entirely clear, however, how Professors Stéfani, Levasseur and Bouloc would categorise defensive force against a minor - compare pp. 350 and 351.
200. See e.g. Bouzat et Pinatel, supra, p.362: "... vis-à-vis d'un irresponsable, la défense perd le caractère d'acte de justice ..."
201. Garçon, supra, A328 no.96; a notion which is also found among proponents of the private defence view e.g. Stephen, *General View*, supra, 121.
202. See eg Stephen, *Digest*, supra, p254 footnote 6; Smith and Hogan, *Criminal Law*, supra, 328.
203. Lablancherie, M., *La Légitime Défense*, thèse (Bordeaux, 1909), 62.
204. Two remarkably similar incidents in Britain and France underline this point. On 31st July 1978, a police officer was shot dead by an individual in the Iraqi Embassy in Paris who opened fire from the premises upon a number of people outside the building. And in the famous incident outside the Libyan People's Bureau in London on

17th April 1984 woman police constable Yvonne Fletcher was killed by a bullet fired from within the building. The French officer was armed. Woman police constable Fletcher was not, but the principle remains the same; that they both enjoyed the right to use force in private defence against their respective assailants.

205. *Supra*, II, Ch. V, §V, p289.
206. Foster, *Discourse*, *supra*, 277; c.f. East, *Pleas of the Crown* *supra*, 278; Stephen, *New Commentaries*, *supra*, 105; Hale, *Pleas of the Crown*, *supra*, 480; Smith and Hogan, *Criminal Law*, *supra*, 327-8; Priolaud, A., *Du Droit de Légitime Défense*, thèse, (Angoulême 1903), *supra*, 81; Sieurac, F., *La Légitime Défense*, thèse, (Toulouse 1896) 61; Lablancherie, M., thèse (Bordeaux, 1909), *supra*, 55.
207. Alison, *supra*, 18, citing Hume and Burnett.
208. Burnett, *supra*, 43; Hume, I, 230, 232; *Encyclopædia of the Laws of Scotland*, *supra*, para.276. One should note that there is possibly room for confusion on the part of the unwary in Hume's assertion, typical of those of other writers, that one could not have full self-defence "if the pannel (had) himself in any degree been the cause of the fatal strife." For underlying the whole fabric of the notion of self-defence in a quarrel (and indeed the early law of private defence in England) which could nevertheless lead to acquittal, was the idea of mutual 'fault'. However, what differentiates the issue of defender-precipitated attack from normal 'quarrel self-defence' is the gravity of the fault on the part of the original attacker. It was more serious in the latter than the vague, general notion of fault understood in the situation of quarrel self-defence.
209. Hale, *PC*, 480-482. Hale drew the distinction between instances where one struck the first blow but then retreated to the wall, before killing, and those where one initiated the violence but was assaulted so fiercely in riposte and consequently fell, or could not otherwise retreat, before killing. The issue of retreat was critical; the fall not being voluntary (as flight is), thus failed to indicate that one had declined or sought to decline combat "for otherwise we should have all cases of murders or manslaughters by way of interpretation turned into *se defendendo*" (481-2). East took the same view (*PC*, 282).
210. *Discourse*, *supra*, 277: "...I think the first assault in a sudden affray, all malice apart, will make no difference, if either party quitteth the combat and retreateth before a mortal wound be given ..." (original emphasis).
211. E.g. Muyart de Vouglans, *Institutes*, Pt. I, Ch. I, p9; Guy du Rousseaud de la Combe, *Traité*, *supra*, Pt. I, Ch. II, S.7.3, p.83; Jousse, *Traité*, *supra*, III, Pt. IV., Tit.XXI, Art.VI, no.84, pp516-17.
212. *A Treatise of the pleas of the Crown* (1716) Book 1, Ch.29, s.17, p75.
213. See eg Master of Tarbat & Others August 18th & 19th, 1691, cited by Hume, I, 232; and see the extremely rigorous case of George Cuming 6th November, 1695 (Hume, I, 233 footnote 1) where the accused had killed

to save himself after his verbal provocation had induced the deceased to attack him. He was convicted of murder and and sentenced to death.

214. E.g. Drayton's Case, cited East, PC, 277-8; R v Bourne (1831) 5 Car. & P. 120.
215. Unreported; Edinburgh High Court, August 1945; cited Gordon, *Criminal Law of Scotland*, *supra*, 758.
216. *Id.*
217. Ashworth, A.J., *Self-Defence and the Right to Life* (1975) CLJ 282, 302, footnote 74.
218. E.g. Ashworth, A.J., *Self-Defence and the Right to Life* (1975) CLJ 282, 299-301; c.f. *Russell on Crime*, *supra*, 438.
219. *Id.* at 301.
220. The notion is rooted in such cases as R v Rose (1884) 15 Cox 540, per Lopes, J at 541; see however Chan Kau v R (1955) AC 205, per Lord Tucker at 214, and R v Lobell (1957) 1 All ER 734, per Lord Goddard at 735. The problem arises partly through the perpetuation of the distinctions in the early authorities between private defence against a felon and private defence upon a sudden quarrel. In the latter case the law appeared to assume a certain element of blame on the part of both parties, though the precise distinction between the two has never been satisfactorily explained. While modern caselaw has tended to speak of justification (or indeed both sometimes - see H.M.A. v Carson & Anr. (1964) SLT 21) the rules of private defence which were applied, most notably in relation to the 'duty to retreat', articulated the earlier law.
221. E.g. Cr 19 décembre 1817 S.1818.I.393 (Carmaniet); Cr 27 mars 1818 B.C. no.36 (Rosay); Cr 8 janvier 1819 S.1819.I.3; B.C. no.3 (Cazelles); Limoges 24 juin 1884 S.1886.2.57 (Dufour c Marginier).
222. *Garçon supra*, A328 nos.85-95; Chauveau et Hélie, *supra*, 188-9; Decocq, A., *supra*, 319; Delmas-St.Hilaire, J.-P., *Jurisclasser Pénal*, *supra*, no.127; Le Sellyer, *Traité*, *supra*, 266; Sieurac, *supra*, 59-60; Gèze, *supra*, 109-112, c.f. 93; Lablancherie, *supra*, 54; *Répertoire Général Alphabétique du Droit Français*, *supra*, *Légitime Défense*, no.67. Mention must be made here of the case of an attack by the outraged husband who finds his spouse at home in flagrante with another person. Up until 1975, any killing committed by the husband in such circumstances was, by virtue of Article 324 para. 2 (repealed by loi no.75-617 du 11 juillet 1975, Article 17) covered by the qualified excuse of provocation. The question this raised was whether in such circumstances the guilty couple could defend themselves against his attack. While Jousse in his time felt that they could not, and were guilty of murder if they killed in doing so ("le coupable d'un adultère en prend sur lui toutes les suites" *Traité de la Justice Criminelle de France*, *supra*, Vol.3; Pt. IV, Tit.XXI, At.VI, no.53, p503) later writers were virtually unanimous in considering this opinion to be wrong: *Garçon*, *supra*, A328 no.87; *Sieurac*, *supra*, 62-63; *Le Sellyer*, *supra*, 267-8; *Répertoire Général Alphabétique du Droit Français*, *supra*, no.66;

Priolaud, supra, 82; 55-57. Jousse did, however find a champion in one writer of the time, Bertauld (*Cours de Code Pénal*, 4ème éd. Paris 1873, 16ème leçon, p363, cited by Lablancherie). Bertauld seemed to rely on the famous decision of the Cour d'appel de Limoges 17 juin 1844 D.1844.1.777 (Braquet) to support his theory. But it is clear that the case was decided within the context of Article 329(1) dwelling defence (*infra*, Chapter 4) which at the time was viewed as raising an irrebuttable presumption of private defence. The decision cannot, it is submitted, be cited in support of Bertauld's theory.

It is in this context that Professors Stéfani, Levasseur and Bouloc (*Droit Pénal Général, supra*, 350) discuss the issue of defender-precipitated private defence, likewise permitting it. One may only suspect, since the matter is not dealt with directly, that they applied the same reasoning to a physical attack, especially given the fact that Article 324 para. 2 had already been repealed when they wrote. Cf. the case of James Christie November 1731, cited by Burnett (53). There, the accused killed his wife's paramour when he found them in the act of adultery. This was "*not found entirely justifiable*" (original emphasis). One may wonder what view Burnett would have taken had he looked at the question of private defence from the point of view of the deceased.

223. See Cr 4 décembre 1973 L.73-90.453 (Kordasiewicz); (also) Cr 14 janvier 1976 L.74-91.383 (Fatier) (also) Cr 26 février 1980 L.79-93.246 (Abdelkaoui). Delmas St.-Hilaire (*Jurisclasser, supra*, no.127) does however cite Cr 31 mai 1972 B.C. no.184 and Cr 5 octobre 1976 B.C. no.276 (Hallal) as indicating judicial hostility. But it is not clear that from the principle in both cases it follows that the notion of defender-precipitated private defence is excluded. For both cases involved judgements in which the *Cour de cassation* rejected the idea that one who was acquitted by way of private defence could then have civil damages awarded against him, to compensate for the failure in the criminal courts; "*la légitime défense exclut toute faute*". Thus the reasoning of the *Cour de cassation*, which is reflected in numerous decisions going back to the early 19th century, is *deductive*, not *inductive*, and cannot safely be taken to imply condemnation of the principle of legitimate defender-precipitated defence.
224. Criminal Appeal Court October 1945, unreported, cited Gordon, *supra*, p761, footnote 77, *supra*.
225. In the very recent case of Fenning v H.M.A. (1985) SCCR 219, at 225, Lord Cameron, speaking of the rules of self-defence, referred to "*The degree of force which is in law permissible to repel an unprovoked attack...*" (emphasis added).
226. See also Williams, *Textbook*, 504; Chauveau, A. et Hélie, F., *Théorie du Code pénal*, Vol. 4, (Paris 1872) p189.
227. See also Gordon, *supra*, 761; Williams, *Textbook, supra*, 505.
228. In the State of Washington (U.S.A.), the original attacker must, in order to benefit from self-defence under common law, in good faith desist from his attack and attempt to communicate his withdrawal to the victim (See La Fond, J.Q., *The Case for Liberalizing the Use of Deadly*

Force in Self-Defense (1983) *University of Puget Sound Law Review* 237, 254). One may question though whether such a practice of good-sense should be elevated to the status of a fixed rule of law.

The rule does, though, have solid foundations in the common law of England, for the early writers all demanded a true attempt at disengagement and flight - true flight, not a tactical retreat (see Hale, FC, 481, 482; East, FC, 282; Foster, *Discourse*, 277). But it is to be noticed that the rules in relation to retreat have become less rigorous in English law over the past two decades, although the precise effect of this recent caselaw remains unclear - see *infra*, Chapter 2.

229. E.g. *Hillan v H.M.A.* (1937) JC 53, per Lord Justice-Clerk Aitchison at 58; per Lord MacKay at 62 and Lord Wark at 64; *Robertson and Donoghue v H.M.A.* Criminal Appeal Court, October 1945, (unreported, cited Gordon, *Criminal Law of Scotland*, *supra*, 758 ("savage excess"); *Fraser v Skinner* (1975) SLT (n) 84, 85; *Fenning v H.M.A.* (1985) SCCR 219, per trial judge (Lord Mayfield), quoted at 220; c.f. *H.M.A. v Doherty* (1954) JC 1, per Lord Keith at 4-5; *Reed v Vastie* Times February 9th, 1972; *Palmer v R* (1971) 1 All ER 1077, 1088; *Reference under S48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)* (1976) 2 All ER 937, 947; *Brown v U.S.* 256 U.S. 335; 65 Law Ed. 961 (1921).
230. Cf. Ashworth, A.J. *Self-Defence and the Right to Life*, *supra*, (p301), where he cites *Mancini v D.P.P.* (1942) AC 1; *R v Chisam* (1963) 47 CAR 130 and *R v Julien* (1969) 2 All ER 856 as suggesting that "the defendant's fault in causing or provoking conflict does still influence the judicial approach to self-defence cases." But one should be wary of confusing issues of law with questions of fact. It is one thing to say that when a person who claims self-defence was the first to use violence, then this may well justify especially close scrutiny of the surrounding circumstances, which may well reveal that the accused was not in fact acting in self-defence; it is quite another to assert that as a matter of law defender-precipitated attack excludes a full plea of self-defence. The decision in *Mancini* proceeded on the basis that the accused's version of events was in fact disbelieved by the jury.
231. It is clear that the question of defensive force by an original attacker is closely linked to the amount of force which the law considers to be acceptable in the defensive act (by the original victim), as to which, see *infra*, Chapters 2 and 3.
232. Priolaud, A., *Du Droit de Légitime Défense*, *supra*, 78-80; Chauveau et Hélie, *Théorie du Code Pénal*, *supra*, 188-9; and see Delmas-St. Hilaire, *Jurisclasser*, *supra*, no.127: "Dès lors, de deux choses l'une: ou bien la première agression est plus qu'une simple provocation, elle a placé l'agressé dans la nécessité actuelle de se défendre et l'agresseur initial ne saurait invoquer la cause de justification de l'article 328 pour réagir contre les actes de violences déclenchés par son attaque; ou bien il y a eu simple provocation: la réaction du provoqué reste injuste et la légitime défense pourra bénéficier à celui qui répond à cette réaction."

It is possible, though, that some authors drawing this distinction had not so much excluded the possibility of a revenge attack more or less *ex intervallo* after a serious assault, than failed to consider such a

scenario. However, this cannot be said of Priolaud, *supra*, 79, who expressly denied the original assailant self-defence in such a case. See though, East, PC, 278.

233. *Infra*, Chapter 2.

234. *Infra*, Chapter 3.

235. *Infra*, Chapter 3.

236. Though not with overwhelming enthusiasm. See Stephen, *General View*, *supra*, 122: "... self-defence against a slight assault must, if justifiable at all, be confined within the narrowest of limits...". Cockroft v Smith (1706) 2 Salk. 642; Rowe v Hawkins 1 F & F 92; R v Hewlett 1 F & F 91; Carman Deana (1909) 2 CAR 75; People v Keatley (1954) IR 12; Hume, i, 334-5; Alison, i, 177; *Encyclopædia of the Laws of Scotland*, *supra*, para.295; Hillan v H.M.A. (1937) JC 53; Fraser v Skinner (1975) SLT (n) 84; c.f. Connorton v Annan (1981) SCCR 307

237. Cr 26 mars 1857 B.C. no.126 (Pioger); Cr 2 août 1866 D.1866.5.493 (Hinderer); Cr 26 avril 1884 B.C. no.150 (Auriol); Cr 5 août 1881 B.C. no.193 (M.P. c Brière).

238. Le Sellyer, *Traité de de la Criminalité, de la Pénalité et de la Responsabilité*, *supra*, 257; *Répertoire Général Alfabétique du Droit Français*, Fuzier-Herman, éd., Vol.26 (Paris 1898), *Légitime Défense*, no.41; Priolaud, A., *Du Droit de Légitime Défense*, *supra*, 55; Sieurac, F., *La Légitime Défense*, *supra*, 45; Chauveau, A. et Hélie, F., *Théorie du Code Pénal*, Vol. 4, (Paris 1872) 179.

239. Bouzat, P., et Pinatel, J., *Traité de Droit Pénal et de Criminologie*, *supra*, Vol. 1, 362.

240. See Lablancherie, M., *La Légitime Défense*, *supra*, 21: "Mais toute attaque ne donne pas lieu au droit de défense, il faut encore qu'elle soit grave." C.f. Priolaud, A., *supra*, 42, 84; Sieurac, F., *supra*, 34, 45; *Répertoire Général Alfabétique du Droit Français*, Fuzier-Herman, éd., Vol.26, *supra*, *Légitime Défense*, no. 28.

241. "Tout mal causé à la personne est de par sa nature même irréparable: rien ne peut faire qu'un coup de poing donné dans la figure n'ait pas été reçu, et la réparation pécuniaire n'en effacera pas les traces." Garçon, *supra*, A328 no.35.

242. See Garçon, *supra*, A328 nos. 34-7; c.f. no. 53: "Mais ils confondent ainsi l'existence du droit de défense avec ses limites." And see Palmer v Reginan (1971) 1 All ER 1077, per Lord Morris at 1084: "An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted."

243. *Code Pénal Annoté*, *supra*, A328 no.97.

244. East, PC, *supra*, 271; Hale, PC, *supra*, 484; Foster, *Discourse*, *supra*, Ch.3, 274; Stephen, *New Commentaries*, *supra*, 100; c.f. R v Wheeler (1967) 3 All ER 829; Hume, i, 218; Burnett, 53; MacDonald, *supra*, 107; Anderson, *supra*, 17, 147; *Encyclopædia of the Laws of Scotland*, *supra*, para.288;

Gordon, *supra*, 761, 763; Crawford v H.M.A. (1950) JC 67, per Lord Keith at 71; Delmas-St. Hilaire, J.-P., *Jurisclasser Fénal*, *supra* no.112; Garçon, A328 *supra*, no.45; Stéfani, Levasseur et Bouloc, *Droit Fénal Général*, *supra*, 346, 351 ("la femme qui tue l'homme qui tente de la violer, est sans aucun doute en état de légitime défense"); Merle et Vitu, *Traité*, *supra*, Vol.1 512; Chauveau et Hélie, *supra*, 179; Le Sellyer, *Traité*, *supra*, 256; Répertoire Général Alphabétique du Droit Français, Fuzier-Herman, éd., Vol.26, *supra*, *Légitime Défense*, no.45; Priolaud, *supra*, 56; Sieurac, *supra*, 37, 44-8; Gèze, H., *supra*, 68; c.f. Rousseaud de la Combe, *Traité des Matières Criminelles*, *supra*, I, Ch.II, s.7.3, p82; Muyart de Vouglans, *Institutes*, *supra*, Pt.I, Ch 1, p10. The Belgian scholar Haus argued that private defence could not avail a prostitute who was at risk of being raped, a notion which is rightly repudiated by, among others, Priolaud (*supra*, 59-60) and Lablancherie (*supra*, 26); as Lablancherie points out, "elle reste, comme la femme honnête, maîtresse absolue de son corps et investie des mêmes droits"; see Haus, *Principes Généraux de Droit Fénal Belge*, (Paris, 1874) 448, cited Lablancherie 26.

245. See, *infra*, Chapter 3.

246. (1959) JC 39.

247. So far as France is concerned, it is important to note that since the *loi du 23 décembre 1980* (no.80-1041) the crime of rape is constituted by any form of sexual penetration (see *Code pénal* Article 332). It is submitted that in such instances, the right of riposte should be the same as that permitted the woman who defends herself against a heterosexual attack threatening or involving vaginal penetration. See further, *infra*, Chapter 3.

248. E.g. Hillan v H.M.A. (1937) JC 53; c.f. Cr 26 avril 1977 L.76-91.143 (Procureur-Général près la Cour d'appel de Besançon et Dame Souad Bent Moussa) (cassation on other grounds); Assises du Haut-Rhin 31 octobre 1957 (Dame Nowack et Société de Secours Minière du Haut-Rhin c Swidlikiewicz et M.P.) - annulled on other grounds by Cr 3 décembre 1959 B.C. no.531.

249. Cf. Sieurac, F. *La Légitime Défense*, *supra*, 48; Priolaud, A., *Du Droit de Légitime Défense*, *supra*, 43; Lablancherie, M., *La Légitime Défense*, *supra*, 23; Gèze, H., *De la Légitime Défense et des ses Rapports avec la Provocation*, *supra*, 67. However, the writer would stress that the justification of even a serious riposte would not have to be based upon the fear of serious physical violence, but on the mere fact of the grave deprivation of liberty itself, although clearly the circumstances of most incidents would render the distinction somewhat thoretical.

250. This point brings us back to the issue of imminence which we examined earlier in the present chapter. For example, in the case of the siege at Clairvaux Prison, *supra*, it could not be said that the deceased were at the stage of making an attempt upon their captives' lives when they were shot. The propriety of the action taken by the *gendarmerie*, though, could not for a moment be questioned, for leaving circumstances to develop any further might well have resulted in the death of the hostages.

251. See *infra*, Chapter 5, which examines the use of force in face of the illegal acts of officers of the law.
252. Garçon, *supra*, A328 no.47; Merle et Vitu, *Traité, supra*, Vol.1, 512; Cr 21 juillet 1977 L.76-93.354 (Majansac et Faudas).
253. E.g. Cr 24 novembre 1899 D.1901.1.373 (Chesnay c M.P.).
255. Similarly, consider the following situation: X, Y and Z are standing at a bus stop waiting to go home. Along comes A, who proceeds to mouth obscenities and generally hurl abuse at them, to their great anger and embarrassment. R intervenes to halt A's abuse, and is involved in a scuffle with him. One would be forgiven for thinking that R does so to protect the honour of X, Y and Z. But in reality, any such force would be used in order to prevent a breach of the peace, for example, not for third party private defence.
256. *Infra*, Chapter 3.
257. S.1960.I.270, note Hugueney.
258. *Id.*; also Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie, supra*, Vol 1. 360; Delmas-St.Hilaire, J.-P., *Jurisclasser, supra*, *Faits Justificatifs*, no.109.
259. "(Attendu que) la dame X a pu avoir l'impression que les parents de la demoiselle Y, loin de s'opposer à cette fréquentation, attiraient le jeune homme chez eux, le recevaient malgré l'interdiction de sa mère, et favorisaient entre les jeunes gens un «flirt» qui cependant ne pouvait avoir que des conséquences funestes;... que ... ce mariage paraissait contraire à ses intérêts moraux les plus évidents; ...Attendu, par ailleurs, que le tribunal ne peut ignorer l'aspect moral du problème...."
260. "Attendu ... que loin de donner ~~donner~~ eux-mêmes à leur fille la gifle qu'elle avait largement méritée (ses parents) encourageaient celle-ci dans son attitude en se constituant partie civile;... que s'ils avaient eux-mêmes surveillé leur fille, celle-ci n'aurait pu se trouver en situation de recevoir une gifle méritée..."
261. "Attendu ... que la dame X estime, avec raison, qu'à 16 ans, son fils est encore trop jeune pour former des projets de mariage." (emphasis added).
262. In the *Avant-Projet du Code Pénal*, juin 1983, Article 35 replaced "défense de soi-même" ou d'autrui with "d'une personne". Interestingly, Professor Couvrat finds in this change room for believing that the drafters intended to facilitate jurisprudential extensions to the scope of private defence, in order to cover just such forms of aggression; see Couvrat, P. *La Notion de Légitime Défense dans le Nouveau Droit Pénal*, VIème Congrès de l'Association Française de Droit Pénal, Faculté de Droit et des Sciences Economiques de Montpellier, 7, 8 et 9 novembre, 1983. p5.
263. *Infra*, Chapter 4.
264. Speaking of the law of Ancient Egypt, Bossuet wrote "... leurs lois étaient simples, pleines d'équité et propres à unir entr'eux les

citoyens. Celui qui, pouvant sauver un homme attaqué, ne le faisait pas, était puni de mort, aussi rigoureusement que l'assassin." Discours sur l'histoire universelle 3ème partie, Ch. 3, quoted by Le Sellyer, A.-F., *Traité de la Criminalité, de la Pénalité et de la Responsabilité*, Paris, 1874, p269.

264a Eg Coke, Institutes III, 56; Hale PC 478.

265. PC 484.

266. *New Commentaries on the Laws of England*, Vol. IV (1845), p107. See also *Russell on Crime*, *supra*, pp. 441-2.

267. Textbook 501.

268. (1884) 15 Cox 540.

269. Mr. Justice Lopes referred to parents and children, and spouses.

270. (1963) 47 CAR 130.

271. (1966) 1 All ER 62; (1966) Crim. L.R. 108.

272. See however, *Russell on Crime*, *supra*, p681, where the author speaks of the general justification of assault and battery, citing Hawkins.

273. *Ibid.* at 64.

274. In *Devlin v Armstrong* (1971) NI 13, Lord Chief Justice MacDermott declared that self defence did not apply as between individuals who were strangers (pp.35-6): "The ambit of the doctrine of self-defence may be wider than it once was, but when considered apart from (the right of crime prevention under s.3(1) of the Criminal Law Act (Northern Ireland) 1967) some special nexus or relationship between the party relying on the doctrine to justify what he did in aid of another, and that other, would still appear to be necessary. Without attempting to define that factor, I cannot accept, on the material available, that it existed as between the appellant and the people of the Bogside. There is nothing to suggest that she belonged to or had property or a home in that district, and her status as a Member of Parliament would not, of itself, afford her protection by supplying a special relationship. It would seem as though she came in as a visitor and made common cause with the rioters, but I cannot regard that as an adequate relationship on which to found a defence of justification by way of self-defence." His Lordships remarks were, however, in response to what Professor Williams declares was a "hopeless appeal". C.f. *People v Keatley* (1954) IR 12. There, the appellant had acted in the defence of his brother. 'Self-defence' was ultimately upheld as a legitimate plea, but there is no direct statement as to whether this arose from a general right between third parties, or because of the relationship between the two. The court did however, express doubt (p17) on whether the old textbooks were correct in their restrictive description of the law.

275. *Id.* And see *Duffy*, *supra*.

276. I, 218.
277. At 57: "The husband or father may, with impunity, put to death the Ravisher of their Wife or Daughter; or a relation, friend or servant, him who assaults with an intent to kill their relation, friend, or master."
278. (1964) SLT 21.
279. (1837) 1 Swin. 404.
280. At 57: "... But will this right extend to mere strangers, who may be standing by at the time ? or will a friend or servant, and still more a stranger, be justified in killing him who feloniously and forcibly invades, not the person, but the property of another ? - These are questions, perhaps, of some nicety, but as to which our practice affords no precedents to guide us."
281. I, 218: "In like manner as a man kill in resistance of an attempt on his life, so may a woman in resistance of an attempt to commit a rape on her person, an attempt at which she is entitled to feel the highest indignation and resentment. The husband also, the father, or the brother of a woman thus invaded, nay any one who is with her, has a right to partake of these emotions, and to defend her from this cruel and irreparable injury, at the peril of the invader." It is not entirely clear whether Hume meant "any one who is with her" to include any person who came across her in her plight.
282. I, 135.
283. See e.g. *R v Redman* (1978) VR 178, per Kaye, J at 178.
284. See for example the issue of retreat, *infra*, Chapter 2.
285. Although it is fair to say that previous law was not all one way. Muyart de Vouglans (*Les Loix Criminelles de France*, Paris 1780) appeared to limit the right to certain specified relationships, speaking of "ses proches" and citing father-son, master-servant, husband-wife, and vice versa (p.32); Guy du Rousseaud de la Combe (*Traité de Matières Criminelles*, Paris 1788 p.81) saw it as extending to the defence "... des siens.", yet later (p.84) expressly included total strangers - though it appears that he required the original victim to call for your help first. Jousse, on the other hand, demanded no special relationships (p.505, p.507), though the fact that an attack was directed against family, friends or 'associates' provided even stronger grounds for acting in their defence.
286. In the *Avant-Projet de Code Pénal* of June 1983, which allocated a separate article each to defence of the person and to property defence, the former (Article 35) spoke of "la nécessité actuelle de la défense d'une personne....".
287. See e.g. Cass. 19 décembre 1817 S.1818.I.393 (Carmaniet); I.C. Ambert 5 juin 1956 D.1957.S.63; G.P. 5-7 septembre 1956 (Malcurat c Convert); Cr 22 mai 1959 D.1959.S.71 (Baechler); I.C. Lyon 16 octobre 1973

JCP.1974.II.17812 note Bouzat (M.P. et Djeddar Omar c Vernet);
cf. Cr 25 mai 1976 L.75-92.862 (Khelaifia).

288. See eg Delmas-St. Hilaire, J.P., *Jurisclasser Pénal; Faits Justificatifs* no. 109.; Aussel, J.-M., *La Contrainte et la Nécessité en Droit Pénal*, in *Quelques Aspects de l'Autonomie du Droit Pénal*, (Stéfani, G. éd.), Paris, 1956, 253, at 291, citing Pageaud, *infra*. Priolaud, on the other hand denied there was any legal obligation: "La défense ne constitue donc pas une obligation c'est simplement un droit, dont on est libre d'user ou de ne point user ! Nous avons le droit de défendre la personne injustement attaquée, nous en avons même le devoir moral, mais sans en avoir le devoir légal." (*Du Droit de Légitime Défense*, thèse, Angoulême 1903 p42).
289. D.1954.369, note Pageaud.
290. Ibid. at 370.
291. In T.C. Lyon 16 octobre 1973 JCP 1974.II.17812 note Bouzat (M.P. et Djeddar Omar c Vernet), it seems that the accused sought to justify his acts under article 63. However the court reasoned its acquittal in terms of Article 328, which was hardly surprising in the circumstances of the case (a robbery at his petrol station during which an employee was momentarily taken hostage).
292. D.1959.I.161, note M.R., M.P.; B.C. no. 121.
293. *Infra*, Chapter 4.
294. D.1959.I.161, note M.R., M.P. at 163.
295. L.75-91.196.

CHAPTER 2

THE DEFENCE - QUANTITATIVE ASPECTS

1. The Quantitative Factor - Necessity

A. Necessity - The Requirement of an Attack

The fundamental legal requirement of private defence simply articulates both common-sense and sound social policy, namely, that the violence used should be necessary. The criminal law exists partly to forbid or restrain the gratuitous use of force, and it is largely the unavoidability of the violence employed which accords it its legitimacy.

There are, it should be noticed, two concepts implied in this one term. Firstly, the necessity for any violence at all has as a prerequisite the existence of an attack, for clearly, without the latter the question of private defence can never arise; this we examined in the previous chapter. Secondly, assuming that there is an attack either imminent or in progress, the question then - and only then - arises of *how much* violence is necessary to suppress it. Lord Chief Justice Maguire caught this dual character of the term when, considering an appeal, he stated:

"... On the other hand, in order to convict him, they would have required to have been satisfied that ... the accused unnecessarily used force or used more force than was necessary ..." ¹

(emphasis added)

It is the latter issue which occupies us in the present chapter. In France, the word *nécessité* is expressly mentioned in both Articles 328 and 329, and cited as a matter of course by the courts ² and doctrine ³, while Scots and English authorities are replete with specific references to the requirement. ⁴

B. Necessity Proper

The term indeed is largely self-explanatory. The force permitted is limited, not to the level necessary to satisfy one's anger or teach a lesson to the assailant, * but quite simply to that required to repel the attack. It is, in principle, a purely quantitative measure, what the older authorities termed the *moderamen inculpatae tutelae*. * If a slap or light punch will suffice, then the use of a firearm or other deadly weapon will in principle be unnecessary (since the required result could have been achieved by far less violent means) and therefore unlawful. Equally, the continued use of force beyond the necessities of the occasion, once the attacker is neutralised, is illegal.⁷

Society therefore accords the individual a privilege of violence, but not for any purpose. Insofar as it is needed for protective purposes, the individual uses it lawfully. But he does not enjoy a luxury of violence, and if he has achieved his aim, society's interest in prohibiting force once more steps in. It revokes the limited licence, as it were, since its conditions no longer obtain, for unnecessary force flies in the very face of the principle of private defence.

There is, though, a certain compromise in such an approach, for this denial of a blanket right to use devastating 'defensive' force whatever the circumstances of the attack, is achieved, arguably, at the cost of absolute certainty in the effectiveness of the defence. But it is submitted, firstly, that it is the only reasonable option available, unless one posits a system centred entirely on the individual, which denies or ignores the rights and interests of society at large, and of offenders, and which in preventive terms at least, sees no differences among the range of values threatened by the numerous offences which may be committed against person and property.

Secondly, the criticism may only go so far, for as we shall see later the interpretation by the courts of the necessity requirement is not one of scientific exactitude, but recognises the necessarily human, emotive and fallible elements in situations of private defence.

Before, however, examining the judicial interpretation of the requirement, where it arises in court, we may conveniently consider some prior questions. If the legal system does seek to minimise violence then one might well expect this aim to determine how one decides any given question relating to private defence - in other words, given a particular problem, which action would result in more or less violence? And is such action to be required of a defendant before he succeeds in his plea? In short, an examination of the law of private defence merits, in the writer's opinion, some assessment of the issue of conflict avoidance.

C. Private Defence and the Principle of Conflict Avoidance

It is convenient to divide the analysis into four major headings, though no claim is made that they are at all exhaustive.

1. Necessity and conditional demands

Imagine the following situation. A is confronted by B who threatens him with serious violence should he ever catch him going out with B's daughter again. Clearly, assuming A sees the threat to be future and conditional, he would not be justified in replying there and then with force. What then, if he does continue to see the girl, and is attacked by B? Few would dispute that he would enjoy a right to defend himself, and the reason is clear. A is committing no criminal offence, and while B is entitled to demand that A desist in his activities, and indeed may enforce this demand, * the law prohibits him from doing so by violence.

A fortiori, then, is the case of robbery - the clearest example - where A is, say, confronted by B who demands that he hand over his wallet, failing which he will kill him. This topic, the defence of property in general, and other related issues are examined more fully later in the thesis; * however, robbery does merit some mention at this stage. Historically, whatever reservations the law - particularly English law - may have entertained about defensive force against an attack aimed primarily and directly at the person ¹⁰ robbery victims were far less constrained by such

legal restrictions, and could lawfully inflict very serious violence against their attackers. '1 The writer fully approves of this view. But, more specifically, it is submitted that the principle applies whatever the value of the property involved.

Many would no doubt reasonably object to the latter proposition, but such objections are arguably based on an understandable but fundamental error. The mistake is to focus upon the value of the property, and to balance that value against the life or limb of the attacker. Given such a scenario, one may understandably argue that the wallet, or whatever, is worth less than the latter. But this is to miss the point, if not to move the goalposts. For the writer sees no reason to ignore the fact that the owner's life may be placed in jeopardy by the attacker, who is committing a serious criminal offence. In short, the property involved is not the only element in the equation.

To put it another way, it is the difference between an accused shooting a thief who would make off with his apples, and similarly killing a robber who confronts him on the main road and demands his bag of apples or else his life - no humour is intended by the choice of scenario, for the point is quite serious. '2 In the former case, the writer would never argue a case of private defence, '3 but in the latter, there seems no reason for denying a full right of private defence necessary to prevent the serious attack which lies in the background. '4 The words of Professor Williams merit full approval:

"... If V says to D 'If you don't do as I tell you, I will kill you' D is clearly entitled to refuse to obey the order and to resist any consequent attack upon him by V, even though he could have avoided the necessity of self-defence by complying with the order." '5

However, one would indeed go further, for in such situations it is submitted that the threat may in certain circumstances quite legitimately be treated as sufficiently imminent as to warrant a pre-emptive strike, according to normal principles of private defence. '6 The act of attempted robbery is an attack in itself and there seems no good reason for

automatically requiring a further show of force before allowing a defensive strike.

11. Necessity, Prevention and Risk-avoidance

It is submitted that just as one is not obliged to surrender one's freedom of action in order to satisfy the demands of an attacker, one should not be deprived of the right of private defence simply because one had not availed oneself of the possibility of avoiding action in the hours or days leading up to the eventual confrontation.

It has often been stated, particularly in France, ¹⁷ that the plea is only available where the accused had no chance to go to the authorities for assistance. However, such assertions must surely refer to the moment of attack, which would accord with our interpretation of private defence being based upon the absence, on the moment, of public authorities able to enforce one's right to self-protection.

The frequently cited example in this context is where the defender was threatened by someone, and despite having had the time to notify the authorities, did not do so, only to be later attacked and forced to act in his own defence. It is one thing to prohibit the individual threatened from using force in such circumstances, where, as in the example cited earlier, there is no immediate danger - the criminal law exists to punish the issuing of threats and such persons should go to the authorities rather than dispense justice themselves; ¹⁸ it is, though, quite another to deny subsequently the right to use force on the basis that these threats were not acted upon. There are several reasons for this.

Firstly, in all three jurisdictions, and especially France, police resources are put at such a strain by the rising crime rate that it is unreasonable to expect them to be able to provide protection for the accused. ¹⁹ Secondly, it is contended here that private defence is a natural right, and furthermore comes into operation where the public authorities are unable to provide the assistance and protection which is expected in civil society. It is inherently short-term and transient in its nature - violence

against another where public protection is immediately to hand is a fundamental breach of the whole basis of the plea. But the recourse to authorities long before any altercation arises at all is surely quite independent of the situation of private defence, and hardly a requirement of the plea.

Thirdly, it has been argued, and is now more generally accepted, ²⁰ that private defence is a justification of action, not an excuse for it. While one might, at the limit, understand the denial of a plea of subjective, internal human weakness, where the actor knowingly subjected himself to circumstances that would bring about this weakness ²¹ this arguably cannot be so where he unwittingly comes to find himself doing that which the law enjoins him to do. Fourthly, any argument along the 'but for' principle of causation would surely be tenuous in the extreme, for the difficulties of establishing any connection would be insurmountable. Fifthly, and related to this, is the fact that the free will and initiative of the attacker is what is ultimately responsible for the defensive act. While the writer would not argue that private defence renders the accused's actions involuntary, or otherwise negates *mens rea*, ²² he would stress that one must not lose sight of the 'driving force' behind altercations in private defence. For such conflicts require both an attacker and a defender - without the former the plea cannot exist, and so long as an aggressor maintains the pressure of his attack and refuses to disengage, it is his actions which determine the need for violence by the defender. It is surely the case, then, that the burden must squarely lie upon the shoulders of him (or her) who takes the initiative in breaching the criminal law; and the foundation of private defence should not be distorted to a construction which applies against those who otherwise act in legitimate defence of themselves or others.

And this question of free will leads finally, and most importantly in the writer's eyes, to an objection of principle. For it would be a gross betrayal of the rights and interests of the general public, were the legal system, in the interests of some imagined social order, to co-operate unwittingly with the very criminal element it sought to restrain, by condemning those persons who for reasons of their own - fear, ignorance, apathy or whatever - failed to set in motion the wheels of justice or police against those who posed a threat to them. The threatener or aggressor has

by his own choice unlawfully set the scene for a potential conflict but it is submitted that the rôle he plays in setting the parameters by which the defender may subsequently act must stop there, and the defender should not be denied his privilege of self-protection for his failure to take prior action. It is submitted that the approach we followed in examining the 'vexed' question of defender-precipitated attacks in the previous chapter is to be applied here. One should look at the action of the attacker. The aggression is clearly unlawful, and no argument, no third party fault may transform it into anything else. Given that, the denial of a defensive right against a criminal attack without even the colour of legitimacy is surely quite indefensible.

The question which properly falls to be asked by such objectors, who concentrate instead upon the actions of the defender, is whether, independent of the question of private defence, some sanction should be applied against the defender for his failure to take action such as notifying the authorities. ²³ The writer thinks not. Such inaction may be unwise, but arguably it is not illegal. Not without some irony, one may say that notification of the authorities is a privilege which the potential defender may accord his threatener, one which he is entitled to withhold for his own reasons.

R v Field

The same reasoning may help us resolve the important issue raised in the interesting English case of R v Field. ²⁴ The appellant was convicted of the manslaughter of one W. The facts were that he had been involved in a fight with the deceased and the following day was warned by a third party that W and three others were out looking for him. Despite this he remained outdoors, only to be warned by another person that they were approaching, but again he ignored the warning and stayed where he was. When they came up to him, he declared that he did not wish to fight. He was attacked by W and another person, and stabbed W with a knife he had on him. He appealed on the grounds of a misdirection, and this was upheld, the Court of Appeal deciding that the trial judge might have unwittingly led the jury to conclude that F was under a duty to leave the locus before his attackers approached.

In light of the above, the writer fully approves of the judgement. This view is not, however, shared by one English commentator, A.J. Ashworth, who, in his admirable examination of private defence ²⁵ argues that the Field principle "... accords excessive protection to the so-called liberties of the subject ..." ²⁶

Ashworth's words, which echo Dicey's thoughts on the matter, ²⁷ express a view which, with respect, the present writer cannot share. His approach undoubtedly has its foundations in the early English law on private defence; ²⁸ but, with respect, one might question whether such a view does not rest on the disputable premise that short-term measures to minimise violence will translate into long-term social benefits. Not only would any such policy appear to impinge upon the basic rights of free individuals in a civil society, and thus be objectionable on principle, in practice it would surely be of little positive effect, and worse still, counter-productive. It is not for criminals, and particularly violent ones, to dictate by their threats the movements of law-abiding citizens, yet few measures would be more likely to assist them in this respect than a rule which required the latter to refrain from going to public places where there was a likelihood of being attacked. Such a rule would involve "... the question of whether or not the law can afford to encourage bullies to stalk about the land and terrorize citizens by their mere threats." ²⁹ and the court which expressed these words rightly declined to impose any such norm. In Field the Court of Appeal asserted, in the words of the report, that it was:

"... not the law that a man could be driven off the streets and compelled not to go to a place where he might lawfully be because he had reason to believe that he would be confronted by people intending to attack him." ³⁰

The decision may be seen as a logical expression of the principle laid down by Field, J. in the famous case of Beatty v Gillbanks, ³¹ that there was no authority for the proposition that an individual may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act, and with respect, the writer cannot agree with the suggestion

by the commentator that Field may constitute a qualification of the principle in Beatty. ³²

Critique

The principled argument that respect for physical integrity applies to defenders as much as attackers is an admirable one, but it is all too easily capable of serving to deny the fundamental rights of victims by its misguided application, reflecting the notion that somehow the concept of private defence is a concept of equals - equal individuals with equal rights. And yet again, we return to the basic issue. One may question the wisdom of the appellant's behaviour in Field, but that is not the point, for whatever his actions, these have in no way whatsoever changed the criminal character of the aggression. As Chauveau et Hélie put it "*... le fait que l'agent s'y est exposé volontairement ne modifie ni la nature de l'attaque, ni la gravité du danger.*" ³³ and whether the warnings be general or specific, as in Field, one is at a loss to discover precisely why the plea should be denied to those who act in defence against such an attack. Neither the foreseeability of an attack, nor one's perception of that likelihood, in any way detracts from the criminality of the aggression. ³⁴

It might be argued again that one should call the police, but we have already seen the objections to this form of reasoning. In addition, protection here is not as such the point. At issue is the important liberty to move freely, ideally without fear of attack, but even if needs be, in fear of attack. By way of analogy, one might point out that if my neighbour is creating a serious disturbance with noise or some other nuisance, I may seek an interdict or injunction against him. But that in no way prejudices my right to enlist the help of the police on the moment, to quell a disturbance, should the need arise. Similarly, the questions of risk-avoidance, and what has been called the "*pouvoir de se faire police soi-même*" ³⁵ of private defence, are largely independent of each other.

The writer has been unable to find a French case raising the same point as in Field. Early writers held mixed views, some arguing that the attack must be unforeseen, ³⁶ others firmly asserting the right of the

individual to go where he pleased ³⁷ but given the firm recognition of private defence as a justification rather than an excuse, given the general views on retreat, ³⁸ and in the absence of modern authority to the contrary, ³⁹ it is submitted that one may reasonably assume that a similar case would produce an unhesitating affirmation of the Field principle.

Scots law likewise offers no direct authority. However, the attitude which has emerged from the bench there over the years has tended to encourage, if not demand, avoidance of conflict where possible, as a pre-requisite to the success of the plea and it is likely that the courts would not be well-disposed towards someone who voluntarily exposed himself to such danger. Without express judicial statement, such thoughts can only be conjecture, but it is submitted that one would be ill-advised to test one's rights to the public highway in Scotland in the same manner as that chosen by Mr. Field.

Implicit in the preceding thoughts is the argument that such 'rules' regarding risk-avoidance have no place as fixed requirements of law, the observance of which is necessary to a successful plea of private defence. Rather, their rôle should merely be that of assisting the triers of fact in determining the true motives and intentions during the incident, of accused persons who raise the plea. In essence, whether they are followed or not should serve merely as an evidential factor, rather than a rule of law, an approach which, as we shall later see, fits in with some recent developments in English caselaw. ⁴⁰ Even in Scotland, the possible rejection of such a plea in a given case might owe more to disbelief in the accused's denial of belligerence on the occasion, than judicial condemnation of his prior acts.

But there is one field of behaviour which demonstrates such an outright encouragement of danger, rather than a calculated acceptance of it, that policy and principle militate against viewing it in purely evidential terms. The issue is that of combat by mutual consent.

iii. Necessity and combat by consent: 'square-goes', duelling and private defence

French law, especially after 1810, ⁴¹ faced a particular problem in this area, partly due to the legislators' silence on the matter. Under Louis XIII and XIV especially, ⁴² the *ancien régime* had provided for severe penalties in such cases ⁴³ but with the political upheaval of 1789, and up until 1837, the *Cour de cassation* adopted the view that both the revolutionary abrogation of royal law and the silence of the *Codes pénaux* of 1791 and 1810 indicated that duelling had fallen outwith the scope of the criminal law. Thus, in Cr 29 juin 1827 (*Le Lorrain*), ⁴⁴ while recognising the nefarious social consequences of duelling, and upholding an award of damages against the killer, the Court denied, in passing, anything criminal in his actions. ⁴⁵

Such was the state of law until the landmark decision in Cr 22 juin 1837 (*Pesson*) ⁴⁶, when the Court, urged by the brilliant *réquisitoire* of the then *Procureur-Général*, M. Dupin, ⁴⁷ reversed its earlier jurisprudence in terms as emphatic as they were minutely reasoned. No doubt moved by Dupin's trenchant refutation of any alleged post-revolutionary gap in the law, ⁴⁸ they condemned such killings and woundings as criminal, refused them a status in the *Code pénal* separate from the articles which already existed to punish offences against the person, ⁴⁹ and rejected the possibility of a plea of private defence. ⁵⁰ The abrogation of royal law had in no way affected the common law position, ⁵¹ and indeed all that had disappeared was the anachronistic exemption from the law previously enjoyed by noblemen. ⁵² Though the refusal to accord such crimes a separate status did not find favour with all writers ⁵³ the principled exclusion of private defence which also emerged from the *Pesson* case has remained ever since. ⁵⁴

Across the Channel, neither English nor Scots law suffered from such vacillation. In England, Coke condemned the practice, ⁵⁵ as did Hale, ⁵⁶ Foster ⁵⁷ and Stephen, ⁵⁸ who told us that a pre-arranged fight ending in death murder, even though the deceased may have given the first onset. Given the circumstances of the time, it may be assumed that the use of deadly weapons was understood; but whatever the conditions, ⁵⁹ a deliberate

fight, even with fists" ⁵⁰ was always unlawful, ⁵⁰ and indeed there is little reason for supposing that the present-day position is any different. ⁵¹

In Scotland, too, the law looked with little kindness upon those who engaged in pre-arranged battles. Alison declared the killings in such deliberate circumstances, by the use of lethal weapons to be murder, ⁵² otherwise culpable homicide, while any slight doubts Hume may have entertained surrounding the precise charge ⁵³ found no reflection in his exclusion of private defence in such instances, a view shared by Burnett. ⁵⁴

However, English law appears to have looked with greater indulgence upon those who fought a duel in the heat of blood, such as there and then going to a field to 'have it out', "*... for this is one continued act of passion: and the law pays that regard to human frailty as not to put a hasty and deliberate act upon the same footing with regard to guilt.*" ⁵⁵ (original emphasis) and "*... it may be presumed the blood never cooled.*" ⁵⁶ Burnett, while approving of the distinction, ⁵⁷ could offer no decisive Scots authority on it, and it is submitted that Alison's ⁵⁸ and Hume's ⁵⁹ rejection of the English *de recenti* doctrine is both descriptively and normatively correct, for arguably the notion of an agreed combat and the element of preparation, no matter how short, which it implies, are exclusive of the degree of passion and perturbation which would be required to justify a reduction in the species of homicide.

Practical Considerations

Before looking more closely at the possible reasons justifying the criminalisation of consensual combat, one may point out that even a refusal to duel may still carry dangers for an accused. Clearly, if an aggressor handed an innocent victim a weapon and said "*defend yourself*", subsequent combat could hardly constitute a duel. Equally, it is submitted, if one who had received a challenge kept the rendezvous only in order to declare his resolute refusal to fight, but was forced by his opponent to defend himself, again, his action would be nothing but defensive. This would accord with the principle of *Field*, ⁷⁰ but an early Scots case suggesting the contrary, ⁷¹ and the likely rejection of the principle north of the border,

do not offer encouragement as to the probable view the courts there would take of the matter.

And there is a third, very plausible instance one might consider. Imagine X, who is confronted in a confined area by three youths, one of whom offers to have a 'square-go'. He has no wish to do so, but correctly assesses that a refusal on his part would simply provoke a straightforward aggression by all three - in other words he faces an imminent attack. In that case, whether he vainly attempts to bluff his way out of the duel by a mixture of bravado and expletives, or simply launches into a pre-emptive assault, ⁷² his conduct would seem an entirely reasonable form of defence. But, as with the other examples, there would be a formidable problem of proof. Be that as it may, one should not lose sight of the principle that in all three cases the situation is one of straightforward private defence, and in such instances, careful directions would be required from a trial judge to guide the jury. ⁷³

The Rationale of Criminalisation

As for the reasons which on the face of it underly the outlawing of such combat they are not difficult to find. Firstly, one may point out that very often at the root of such incidents is a question of honour *tout court* ⁷⁴ - and whatever value an individual may place on this, it is not one which the law permits one to protect by force. But in any case, the second point is that protection itself is not the issue, for such instances occur rather a *posteriori*, to regain one's honour, and are thus quite antithetical to the notion of protective private defence. Thirdly, the act is, indeed, more one of revenge, ⁷⁵ and of punishment, implying the notion of retribution; and this invites two objections, for firstly, need it be repeated, this function is not one which the individual may take upon himself, but lies within the exclusive domain of the State so far as the criminal law is concerned. As Coke tells us: "... in a settled State governed by Law, no man for any injury whatsoever, ought to use private revenge, for revenge belongeth to the Magistrate ...".⁷⁶ In the second instance, duels will in any case often be fought over words or deeds which do not even constitute criminal offences, and therefore could never give rise to the question of punishment.

A fourth line of criticism, relating more directly to private defence, and overwhelmingly approved in all three jurisdictions, is articulated by the *Cour de cassation* in Cr 22 juin 1837 (Pesson):

"... Attendu que ... on ne saurait admettre que l'homicide commis, les blessures faites et les coups portés dans un combat singulier, résultat funeste d'un concert préalable entre deux individus, aient été autorisés par la nécessité actuelle de légitime défense de soi-même, puisqu'en ce cas le danger a été entièrement volontaire et la défense sans nécessité, ce danger pouvant être évité sans combat. 7°

In other words, the very concept of consensual combat flies in the very teeth of the notion of private defence, breaching the fundamental requirement of necessity. One may distinguish *Field*, for there the principle was negative, in that the individual had no obligation to give up a public right to avoid combat. Here the situation is quite different, for the individual seizes the opportunity to commit what is *prima facie* and remains an unlawful act. The destruction or injury of the opponent is both a means and an end in itself. as Dupin himself remarked, "...le duel comporte l'aggression autant que la défense." 7° Indeed, most damning perhaps, is the criticism that such offences, particularly homicide, lie condemned for the very premeditation or concert and design 8° which are so fundamental to their character, thus if anything, ironically urging their distinction from 'normal' offences, true, but by way of aggravation, not mitigation.

And finally, one may point out that such combats are a social harm in themselves, in their elevation of *prima facie* criminal acts into some accepted social ritual which runs entirely contrary to the basic principle of criminal law, 9° and in the risks they constitute to public order and private safety. 10° It is submitted that those who incline to the theory that some fights should not be subject to the criminal law, 11° forget - or ignore - the important long-term and short-term interests of the State (and the general public) in discouraging violence, wherever this is reasonably possible. Fundamentally, the writer would object that proponents of this

view are unable to provide a satisfactory answer to the most basic question of all: precisely where lies the need for such violence in the first place ?

Surprisingly, however, it is possibly public policy more than anything which properly justifies the criminality of duelling and the exclusion as such of private defence. For close examination of combat situations would seem if anything to prompt rejection of the restrictive approach developed above.

Consider A and B who have a 'square-go'. Both are later charged with assault. A cannot plead B's consent as a defence, for such consent is quite irrelevant, and cannot negate the criminality of his acts. ²⁴ Nor, *prima facie*, can he plead private defence, for he actively sought out and willingly joined in the combat, rendering the latter utterly unnecessary. However, looking at B, his actions fall to be interpreted in exactly the same way. ²⁵ One therefore has the curious situation of each committing an offence, yet neither, in theory, being able in law to inflict violence in his own defence. On the basis that private defence is a justification, then, strict legal principle would surely permit private-defence in fact - but presumably public policy would demand denial of the plea as such in law, the prior "concert and design" presumably superimposing itself upon the latter. ²⁶

The Exception to Criminalisation

But is this then to say that in law, one may never plead private defence ? In *H.M.A. v Doherty*, ²⁷ Lord Keith charged the jury in a homicide trial that "...you cannot start up a duel with another man and then say, 'But I killed him or injured him in self-defence.'" ²⁸ However, this is seemingly contradicted by the words of the High Court of Justiciary in *Smart v H.M.A.* ²⁹ There, two youths, including the panel, decided to have a 'square-go'. Smart was subsequently tried and convicted of assault, but appealed on the grounds that the sheriff had been wrong to direct the jury that neither consent nor self-defence was a good reply to the charge. His appeal was rejected on both counts, in a decision largely taken up with the question of consent, but at the end of the judgement the court had this to say:

"...In the circumstances of the case as explained to us we are of the opinion that the sheriff was fully justified in directing the jury that there was no relevant evidence to support the plea of self-defence. It is accordingly unnecessary for us to consider the broader question of whether self-defence could ever be a defence in the case of a combat which started by consent." 20

Now, while the case presents difficulties from several angles, 21 what is of immediate interest here is the apparent contradiction regarding private defence. How could the court deny the plea to Smart on the basis of their principled deliberations, yet in the same breath imply that the plea might be available in some instances? It is submitted that the answer lies in the use of the words "started by consent".

In a normal combat, say by fists, hard blows may well be exchanged, and actual bodily harm inflicted, but in most cases both the relative parity of combatants and an implicit understanding of the limitations of the combat will prevent it degenerating into a fight to the death. Consider, however, the case where one of the combatants in a fist-fight neutralises the other, yet proceeds to kick and beat him about the head and body in an obvious effort to kill or seriously maim him. Or take the case of one who quite unexpectedly draws a knife during the original affray. Here the combat started by consent but can one say that one's consent - such as to exclude effectively private defence in law - was directed at everything that might follow? Clearly not.

It would seem therefore, that applying once more 22 the principle that one looks to, *inter alia*, the criminality of the attacker's action in determining whether a riposte is permissible, one should be permitted in law to defend oneself, with fatal force if necessary, for there is a classic case of attack and defence, giving rise to a right of private defence. However, while an acquittal on any charge relating to the latter part of the altercation would be merited, severe punishment would, it is submitted, be in order for the accused's participation in the original combat.

Such a distinction between 'normal' combats which totally unexpectedly develop into serious combat, and those which are deadly in character *ab initio* would no doubt be relatively rare in practice, but the principle remains good, and it is submitted that it not only explains the apparent contradiction in Smart,³³ but reconciles the words of the High Court in that case with those of Lord Keith in Doherty.³⁴ A similar case from England, Attorney-General's Reference (no. 6 of 1980),³⁵ while drawing different conclusions on the question of consent in relation to the crime of assault, appears to have taken the same view on the possibility of private defence, as that arguably held by the court in Smart.³⁶

iv. Private defence and the duty to retreat

Finally, we may turn to the vexed question of retreat. It has long been a subject of debate whether an accused should be obliged to beat a retreat before he can use justifiable defensive force. Before looking at the state of the law, which reveals quite different approaches in each jurisdiction, we may consider the arguments both for and against the imposition of such a duty.

a. The Debate

First, and most obvious, is the argument, that the duty must follow from the requirement of necessity - a *fortiori* the "absolute" necessity to which the European Convention on Human Rights refers.³⁷ If an avenue of retreat is open, then failure to use it must surely breach both meanings of necessity that we examined at the beginning of this Chapter.³⁸

Secondly, there is the importance which society places in minimising violence. This argument, linked to the above, looks at the situation of conflict, and examines what options are available which would avoid or attenuate the use of violence against any party in the affray.³⁹ And, noticeably, it purports to bring in the important factor of society's interest in the proceedings, rather than examine just the attacker's interests against the those of the defender.

In addition, one might add that it is very much in the defender's own interests to flee, since it halts his (or her) exposure to the risk of violence, by removing him physically from the source of the danger. Also there is the practical argument that by demanding retreat, the law ensures that the tragedies of killings and assaults in putative private defence are kept to a minimum. ¹⁰⁰

Two final arguments may be advanced. Firstly, any suggestion that there should be no such duty is, ultimately based upon the notion - widely prevalent in French doctrine - that it is dishonourable to retreat before one's attacker. We have, though, already seen how honour, in its links with revenge for example, is a somewhat discredited notion in the law of private defence and even in preventive terms, it is argued that feelings of pride weigh little in the calculation. As one American court put it *"No balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash as compared with the inestimable right to live."* ¹⁰¹

Secondly, any legal system which views private defence more as a matter of excuse than justification will be more likely to demand of an accused all efforts to avoid the use of force, before allowing a plea to succeed. This notion will take on a particular significance, as we shall see shortly.

The writer entirely endorses the view that matters of honour have little place in the determination of the question of retreat. ¹⁰² But for the rest, he would contend that in rejecting the principle of a "stand fast" approach they fail to take account of several crucial factors and in particular, are based, ultimately, on one fundamental misconception.

As a preliminary, it has been asserted that such a duty would be of dubious efficacy, in that it would run against the natural inclinations of individuals, whose response would be more of active defence than of flight. ¹⁰³ However, one might not only question whether this indeed reflects the findings of modern psychology and physiology, but argue that even if this were so, it is not necessarily determinant, for one must remember the dual function of a rule of law, in arguably guiding or deterring

the individual's actions on the moment, and in guiding the disposal of the accused at trial. Hence the rule may well serve one of these purposes, though not the other.

Professors Smith and Hogan, on the other hand, argue that the duty to retreat *"... is scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack, but to ward off an attack honestly and reasonably believed to be imminent."* 104 As we saw in the previous chapter, this right to pre-empt one's attackers is established, at least in principle, in all three jurisdictions. 105

However, the validity of the authors' argument is, it is submitted, open to question. It must be recognised that the principle of retreat has only been applied where there was no real danger to the defender in doing so (although its practical manifestations leave something to be desired, as we shall observe). *"The rule"*, as one American writer put it, *"has not been interpreted ... to require retreat into self-destruction."* 106 With this in mind, the writer sees no necessary contradiction. For in the various cases we have seen of pre-emptive defence, it seems clear that the reason it was permitted is precisely because flight, or at least safe flight, was not possible. Where one may *"strike before being struck"*, it is arguably because the moment of attack has come, such as to preclude very often the possibility of a hasty retreat. Therefore, while sharing the authors' disapproval of a blanket duty to retreat, the writer feels unable to support the reasoning by which they arrive at their conclusion.

b. Critique

It is submitted, rather, that the error of many proponents of retreat is to confuse moral and other issues with legal ones. What is wise is not necessarily obligatory, and the law does not make illegal all that is unwise. 107 It may be prudent to withdraw, rather than put up a defence; it may even in the eyes of some, be more proper in moral terms to do so. But the question is whether failure to do this should be sanctioned by the criminal law. The writer thinks not.

Firstly, there is arguably always some danger inherent in retreat. This is not to say that retreat is never a wise option, but acknowledgement of this serves to raise doubt as to whether such action should be imposed as an obligation upon the defender in the heat of the moment. It may well seem safe to back off and take to one's heels, but caselaw has indicated the tragic results which may result from such action, ¹⁰⁰ and the possibility of error in assessing the chances of retreat may well have dire consequences for an accused who runs the risk of losing the initiative in his defence. ¹⁰⁰ Given, then, the fact that at least in principle retreat has never been demanded where one faced real danger in doing so, one might legitimately ask whether, even accepting the idea of a duty to withdraw, it would arise so rarely in practice as to be all but meaningless.

Secondly, one may draw from our earlier conclusions on the issue of unlawful demands and conditional threats. At its most basic, a criminal attack may be viewed as little more than an unlawful demand that one vacate the scene, failing which one may fear and expect to pay the consequences in violence. One has every right to be where one is, and one should, therefore be able to stand one's ground. ¹¹⁰ The writer would furthermore reiterate his argument that it is quite inappropriate to weigh against each other the act of retreat with, say, that of killing or wounding one's aggressor, a spurious application of proportion which has already been criticised. Instead, it is the physical danger faced by the defender, rather than the right he gives up, which is relevant here.

This latter value judgement is based on the third and most fundamental objection. For it is contended here that the imposition of a duty to retreat, however well-intentioned its proponents, is hardly likely to contribute to a minimisation of violence. Certainly, on the short-term view, it might do so (assuming the rule has any deterrent effect). But in the long-term such a rule would arguably serve to encourage those disposed towards violent crime, who would again welcome the law's unwitting co-operation in constraining further the acts which individuals may perform in their defence. A duty to retreat would arguably encourage rather than prevent crime, while the liberty to "stand fast" would perhaps serve to deter. ¹¹¹ Indeed, with the rise in recent decades in violent recorded crime, and the consequent strains upon the police, there is arguably every

reason for adopting an approach more favourable to the victims of crime. ¹¹² Furthermore in many instances of private defence, the defender will also be acting in the suppression of crime, a function which is, at least in theory, incompatible in all three jurisdictions with a requirement of retreat. Clearly, such arguments are inherently difficult to prove; but the writer, for one, sees much sense in the view that some benefit is to be obtained where would-be offenders are made aware "*that their lives are in a measure in the hands of their intended victims.*" ¹¹³

This leads finally to an objection of principle. For it is submitted that the retention or imposition of a duty to retreat is particularly inappropriate in this period where violent criminality is on the increase, and where a reasonable man might view such a move as yet another concession yielded to the detriment, and at the expense, of the victims of crime. Where the choice lies between the interests of an attacker and those of a defender, then, all other things being equal, the weight should arguably lie with the defender.

c. France

But what of the law ? In France, the judicial silence on the topic is, at first sight astonishing. Not one case this century has explicitly dealt with the matter, though the issue has received far more attention from the academics, who have been almost unanimous in rejecting the idea of a legal duty to retreat, ¹¹⁴ the notion of *la honte* playing a not inconsiderable rôle in their arguments. ¹¹⁵

But the law's silence may be explicable in a more juridically precise way. It is in the writer's opinion certainly no accident that, while under the *ancien droit* (which through the influence of canon law viewed acts of private defence as more excusable than justifiable) there was a generalised duty to retreat, ¹¹⁶ the moment the new Code came into effect the matter was treated in an entirely different way by the doctrinal writers, and seemed to be without import as a matter of judicial debate. For the fundamental change which occurred in 1810 was that private defence underwent a transformation from being a matter of excuse to one of justification,

explicitly recognised as such. The more favourable light in which the plea is viewed, then, goes some way to explaining why the rigorous requirements for avoidance which might attend matters of excuse, would not apply.

However, two very interesting decisions, both recent, have emerged from the *Cour de cassation*. In Cr 23 avril 1981 (Abadie) ¹¹⁷ the facts were that A had shot dead one K who, it seems, had tried to gain entry into her house. The deceased was known to her, having previously stayed there, and he was drunk at the time. The appellant's house was in a somewhat isolated location and the incident took place around 11.30 p.m.. The *Chambre d'accusation* rejected the plea of private defence, and sent her for trial on a charge of murder. This decision was upheld by the *Cour de cassation*, which mentioned without comment the fact that the lower court had based its decision partly upon the fact that the woman had had the chance to flee, but had failed to do so. ¹¹⁸ This decision is indeed surprising for the Court's attitude towards retreat. But it is even more so when one considers that the case concerned a night intrusion upon the premises, which, as we shall see later, has always held a special status in the law of private defence. ¹¹⁹ The lower court did seem to doubt whether the incident actually fell under the special case, and it is fair to say that some actions of the accused may have given rise to suspicion; but it is submitted that the decision should have proceeded without reference to the issue of retreat, which was of no relevance. ¹²⁰

In Cr 14 janvier 1976 (Fatieri), ¹²¹ which we examined in the previous chapter, it is telling that the *Cour de cassation*, in upholding private defence, related how F had taken flight after an altercation with the deceased, and it was only when he was on the point of being caught up with that he rounded on his pursuer, and inflicted the terrible wound which killed him. For there are indications in this case that F had himself been partly to blame in the original altercation. If so, the case illustrates in remarkable form the principle, well-known to common lawyers, that flight to the wall was required in cases where the accused had been not without his share of blame for the affray. ¹²² It seems to the writer too much of a coincidence that in what appears to be the first reported case to raise retreat this century, the facts suggest that the accused had indeed been not entirely without fault. Furthermore, does this decision not give room for

deducing, a *contrario*, that - viewing Abadie on its own facts - in the normal case of unilateral attack, the duty to retreat would not normally arise ? In the alternative, Fatieri illustrates the vital importance of a withdrawal as powerful evidence that indeed the accused was acting in a defensive posture, particularly necessary in such a case of original fault. ¹²³

d. Scotland

In Scotland, the picture is quite different. For the law there has traditionally viewed private defence in very strict terms, and it is no surprise therefore that this has resulted in a correspondingly rigorous stance on the matter of retreat. Hume drew the distinction between self-defence against a felon, and "self-defence on a sudden quarrel", and was followed in this by Burnett ¹²⁴ and Alison. ¹²⁵ In the former, such as where an innocent faced a sudden surprise attack upon the highway, ¹²⁶ one was under no obligation to retreat. ¹²⁷ Indeed, being blameless, one was enjoined to stand firm, and could use extreme force to neutralise such a "foul criminal" even pursuing him, using deadly weapons, until one was entirely out of danger. Such an attacker could expect little mercy from the law, and in fact the defender in so acting was rendering a service to society, as underlined by Hume's description of the attacker as "*the fit object ... of extreme and summary justice.*" ¹²⁸ In the latter case, however, it was understood that some, even very minor, fault lay with the defender, and wherever it appeared that "either in the origin or progress of the quarrel, or in the ultimate strife, there was any thing faulty or excessive on the part of the survivor" then the law would require "such a course of conduct to his entire acquittal, as bears earnest of his peaceable disposition, and sincere reluctance to shed the blood of his fellow-creature." ¹²⁹ Not surprisingly, such course of conduct was best met by the duty to retreat, ¹³⁰ which proceeded to secure itself a firm foothold in the law.

Just where this leaves the notion of felon self-defence is not entirely clear. Hume himself admitted that this special case did "*not rest on any judgement of our Supreme Court*", ¹³¹ though he pointed out that nothing on

the record contradicted it. The absence of relevant caselaw since the time of Hume has clearly done nothing to sustain any life there may have been in the notion, and there is, it is submitted, the serious danger that the principle has simply been disapproved by default, forgotten for want of relevant decisions. The writer views it as a matter of great regret that Professor Gordon can doubt whether today a person attacked by a felon can stand his ground, ¹³² but in the absence of cases in point Gordon's is rather the conclusion which falls to be drawn.

Just how restrictive the law is may be seen from several cases. In H.M.A. v Doherty, ¹³³ the accused, who was charged with culpable homicide, had it seems been attacked with a hammer, and killed his adversary with a bayonet which was handed to him. In charging the jury, Lord Keith pointed to the fact that the accused had had his back to an open door, which led on to stairs leading down to a yard below. ¹³⁴ It is not difficult to agree with Gordon's criticism of the direction for its suggestion that an accused might be obliged to use such an avenue of retreat. ¹³⁵ Looking at the authorities, they qualified the duty, in that it would not apply where the defender ran the risk of *"materially increasing his own danger, or putting himself to an evident disadvantage with respect to his defence"* ¹³⁶ and indeed Hume specifically included such an instance as retreat down a dark or steep staircase. Nonetheless, the writer must take issue even with Hume for the implication in his words that the duty might still apply where the increase in danger was not material - whatever that meant. ¹³⁷ That one is faced with an unlawful attack is bad enough. Even less palatable to the writer is the notion that one should have to retreat. But that such a concession to one's attacker may be imposed in law at one's very own risk is surely quite unacceptable. ¹³⁸

Yet in the case of H.M.A. v Kizilevicius ¹³⁹ where the accused was charged with the murder of his father, Lord Jamieson in his charge to the jury simply instructed them that *"there must have been no other means of escaping from the danger to which he was subjected."* ¹⁴⁰ Left in such bald terms, a direction on these lines may well mislead a jury, yet almost fifty years later, we heard much the same words from Lord Mayfield, in the recent case of H.M.A. v Fenning. ¹⁴¹

e. England

In England the earlier law followed a somewhat similar division, though one which has assumed far greater practical significance than in Scotland. While considerable debate and uncertainty still surrounds the precise path which private defence took down the ages, ¹⁴² it seems clear that by the time of Hale, the law drew a distinction between those cases where a defender was obliged to flee, and those where he had the privilege of standing fast and resisting on the spot. As Hale put it:

"Regularly it is necessary, that the person that kills another in his own defence, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for tho in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the laws own not any such point of honour, because the king and his laws are to be the vindices injuriarum, and private persons are not trusted to take capital revenge of one another." ¹⁴³

Thus, in those cases which one might loosely call quarrel private defence, the duty lay upon the defender to retreat, literally "to the wall", ¹⁴⁴ or until some other obstacle obstructed his path: "As if A be assaulted by B, and they fight together, and before any mortall blow given A giveth back, until he commeth unto a hedge, wall or other strait, beyond which he cannot passe, and then in his owne defence, and for safeguard of his owne life killeth the other: this is voluntary, and yet no felony" said Coke. ¹⁴⁵ This view of retreat was shared by Foster, ¹⁴⁶ and Hawkins. ¹⁴⁷ Again, the retreat had to be genuine and in good faith, not merely a tactical withdrawal, ¹⁴⁸ as was later pointed out in the case of *R v Keir*. ¹⁴⁹ However several writers ¹⁵⁰ qualified this by declaring it inapplicable where to do so would clearly be hazardous - though they differed slightly in the standards they set. ¹⁵¹

Such cases then were the majority. However, a vital exception emerged largely from the words of Coke, which were taken up by Hale ¹⁵² and

developed by later writers. For Coke declared that it was no felony if without retreating, a man killed a thief who offered to rob or murder him, either abroad or in his house "for a man shall never give way to a thief".¹⁵³ *Se defendendo* comprised, then, not one general theme, but at least two¹⁵⁴ - the rule (with its qualification), and the major exception to the rule.

Not surprisingly, some writers felt it appropriate to formalise the distinction, and thus Hawkins¹⁵⁵ and Foster¹⁵⁶ separated such killings into excusable homicides on the one hand, and the far more privileged justifiable homicides on the other. Hawkins however had already extended the class to cover "*Murder, Robbery, or other Felony*"¹⁵⁷ which passed largely by virtue of a fundamental ambiguity in Coke's text¹⁵⁸ and by the time Foster wrote, the attempt to commit "*a known felony*" upon either person or property allegedly was the test, a formulation repeated by East.¹⁵⁹

Though opinions differ as to just how wide the scope of this exception really should have been, there is little doubt that the law looked benignly upon those attacked within the dwelling or by robbers, showing correspondingly scant sympathy for their aggressors, a matter which we shall examine in greater detail later in this study.¹⁶⁰ The result of the division though, in practical terms, was that in the majority of cases where the plea was raised, the point in issue was excusable private defence - the defender had to have retreated, where possible. Thus, for example, in the case of *Mancini v D.P.P.*,¹⁶¹ the Lord Chancellor, Viscount Simon, clearly considered the trial judge to have been too favourable to the accused in his failure to charge the jury on the issue of whether Mancini might not have retreated before fatally stabbing his opponent.¹⁶²

Recent Developments in English Law

Such appeared to be the law until the famous case of *Julien*,¹⁶³ which provided the first hint of a shift in the common law. There the appellant had somehow become involved in an altercation with one D, and threw a milk-bottle at him, injuring him in the head. He claimed that he acted in self-defence, D being armed with a chopper at the time. He further sought

to justify his arming of himself with another bottle and a length of piping by virtue of the alleged threat to him. He was convicted, *inter alia*, of assault occasioning actual bodily harm, and appealed on the grounds of various misdirections. Though the appeal was allowed due to a misdirection on the burden of proof, the court rejected counsel's submission on the substantive question of retreat. Significantly, their Lordships dismissed the argument that the duty was only restricted to cases of homicide, ¹⁶⁴ and went on to declare:

"It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal ... whether the charge is a homicide charge or something less serious." ¹⁶⁵

(emphasis added)

Two major points emerge from the judgement. Firstly, the Court clearly modified the "flight unto the wall" principle which - at least according to the earlier writers - had characterised the common law. Secondly, though, this was replaced by (or redefined as) another duty, which the appellant in this case had clearly failed to fulfil.

But what was the nature of this duty? If flight had been difficult enough a burden in the old days, how was one to view an *obligation* to *demonstrate* one's *preparedness* to disengage and *perhaps* withdraw? Indeed what did it mean? In addition, as with the traditional duty, such an issue seemed surely to be more suitably of evidential import, than a substantive rule of law, yet the Court clearly favoured the latter. Hence Julien's purported reshaping of the law was more illusory than real. Indeed, if anything, the formulation advanced by the Court of Appeal seemed to confuse rather than clarify the law, and as the first twentieth-century statement directly in point, was all the more regrettable for that. Furthermore, it would not escape attention that for all its disavowal of a duty to take to

one's heels, the obligation was sufficiently stiff as to work against the accused, who on this point alone, would have failed in his appeal.

Two years later, the Court of Appeal had to consider the issue in the case of *R v McInnes* '66. The facts were complex, but essentially the case arose out of a fairground killing, when the accused, one of a group of 'greasers', somehow inflicted a fatal knife wound upon a 'skinhead', after a short struggle between the two. His appeal against a conviction of murder was rejected. The trial judge had in fact charged the jury in terms of the old duty to retreat to the wall. '67 This their Lordships found "expressed in too inflexible terms" and potentially "significantly misleading". '68 Instead, said Edmund Davies, LJ, for the Court:

"We prefer the view ... that a failure to retreat is only an element in the considerations on which ~~on~~ which the reasonableness of an accused's conduct is to be judged ... or, as it is put in *Smith and Hogan's Criminal Law*, '... simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable.' '69

On these words alone, the case would have stood as a watershed in the law of private defence. They clearly indicated that far from being a strict rule of law, the question of retreat had become merely a matter of evidence, in determining whether the accused had truly acted in self-defence. The Court had thus gone beyond *Julien*. Yet astonishingly, in the next sentence, his Lordship stated "The modern law on the topic was, in our respectful view, accurately set out in *R v Julien* ...", '70 and he went on to quote the passage set out above, including the affirmation that the principle applied as much to cases of assault as to homicide.

In the same passage, then, the Court appeared to declare that whether or not one had retreated was merely an aid to the triers of fact, but not the litmus-test of self-defence, while in the same breath announcing that the defender was obliged to effectuate what appeared to be a watered-down version of Hale's strict rule.

The consequent confusion into which the decision had thrown the law, appears to have escaped not only the Court but also most commentators at the time, with the exception of Ashworth, who faulted the judgement for its failure to apply Julien in its original terms. ¹⁷¹ Where it was clear, though, was that the accused had somehow to demonstrate his unwillingness to take part in the combat. ¹⁷²

Thus, whatever Julien and McInnes had done to the common law rule, they had by no means transformed it into the bald right to stand one's ground. And well into the 1970s caselaw indicated that the question of retreat - whatever precisely that now meant - remained very much a live issue. ¹⁷³ This is particularly so in the decision in Field, ¹⁷⁴ which we examined earlier. It is significant that in that case the court, which continued to refer to the duty to retreat, included one of the very judges who had decided McInnes. ¹⁷⁵ Certainly, the implication in Field was that a failure to retreat could, as the commentator rightly pointed out, in some circumstances be construed as unreasonable.

g. R v Bird

It was clear that the law could not remain in such an unsatisfactory state. Yet, it took fourteen years, and the regrettable circumstances of Debbie Bird ¹⁷⁶ before the Court next reconsidered the issue in detail. In that case, the facts were that the appellant was holding a birthday party at her home, when one of her guests, a former boyfriend, came with his new girlfriend. This created an acrimonious disturbance, and the appellant told him to leave, which he did. Later, he returned, upon which a violent argument broke out. It seems she poured a drink over him, whereupon he slapped her. Ultimately, the appellant lunged at him, and a glass which she had in her hand hit him in the face, causing the loss of his eye. Bird appealed against her conviction of unlawful wounding, claiming that the trial judge had erred in his instruction that although there was no longer any duty to retreat as such, there lay upon the jury "an obligation to see whether the person claiming to exercise the right of self-defence should have demonstrated that she does not want to fight at all." ¹⁷⁷

This direction, which was clearly based upon Julien was disapproved by the Court of Appeal, which quashed her conviction. Lord Chief Justice Lane, who had sat in the case of Julien, confirmed that that case had in fact modified the old common law rules. "But", he continued:

"... reading the words which were used in that judgement, it now seems to us that they placed too great an obligation upon a defendant in circumstances such as those in the instant case, an obligation which is not reflected in the speeches in Palmer v R." 170

He then quoted at length from Professors Smith and Hogan's criticism of the decision in Julien, where the authors took issue with the fact that temporising etc. was said to be necessary:

"The matter is dealt with accurately and helpfully in Smith and Hogan, Criminal Law (5th ed., 1983) at p.327 as follows: '(...) A demonstration by D (defendant) at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising, disengaging or withdrawing; and he should have a good defence.'

We respectfully agree with that passage. If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that." 171

On the face of it, the decision ranks as the most solid declaration yet that the matter of retreat has now, to a great extent, changed from being a strict rule of law, to merely an evidential factor. From being a standard to which the reasonable man was held, it would appear to have become simply one test by which his behaviour is to be judged. The decision is also highly interesting for its reference to Palmer v Reginald, 180 to which the

Court equally referred in the major case of Shannon, a decision we shall consider shortly. ¹⁰¹ The influence of Shannon, which gives signs of slowly introducing a more subjectively-based interpretation of private defence, according to whether the accused was acting as an 'attacker' or in a 'defensive' fashion, is evident here.

In its confirmation that the old strict rules of retreat have been very much weakened, the case is to be welcomed. One might in passing, though, take issue with the basic premise of the passage which their Lordships approved. For it suggests that those who demanded retreat implied that failure to do so made one an 'out and out' attacker. Rather, the issue of retreat was in the past largely one dictated by policy, and all other things being equal, one can say no more than that the defender who did not do so simply failed to satisfy all the rules of private defence.

Far more serious, though, is the objection that the case has not in fact, produced the much-needed clarification of the law, despite impressions to the contrary. Certainly the decision does appear to indicate that the view of the law typified by Ashworth is incorrect, and indeed if anything its criticism of McInnes is exactly the opposite of that voiced by that particular writer. ¹⁰² But the judgement itself contains one basic ambiguity. Julien appeared to have watered down the duty to retreat to one of temporising, and so forth. McInnes confused matters by saying the failure to retreat was but one factor in the overall calculation, while going on to stress the duty declared in Julien. Bird gave the impression of taking all this, and simply stating it to be important by way of evidence to the triers of fact as to the propriety or otherwise of an accused's actions. As the Court stated, evidence "that the defendant tried to retreat or call off the fight" might be the best evidence that he was not the attacker, but it was not the only way of showing this. But, in agreeing with the whole passage that they quoted from Smith & Hogan, they necessarily accepted the following statement by the authors to be correct: "If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force." ¹⁰³

How could the court expressly mention retreat, in affirming that its importance was really evidential, yet specifically approve this sentence

which clearly implied that in certain circumstances one would be under a duty to retreat? It is submitted that inherent in both the judgement and the passage it quoted, is the same sort of confusion which in its various forms the Court undoubtedly sought to expunge from the law.

Adding to this confusion is the uncertainty now as to just when retreat will be seen as the only reasonable course of action - if indeed the Court meant the duty to be retained in some instances. For it would be most incautious, in light of the above, to interpret the judgement as having firmly imported the "true man" rule, the generalised liberty to stand one's ground, into English law.

The issue of retreat, it is submitted, highlights best how the concept of "reasonableness", which underpins the law of private defence in England, ¹⁰⁴ cannot suffice to meet the needs of the victims of attack and those who try them. While disagreeing with the substance and premises of the earlier rules, the writer cannot but regret the loss of certainty which has accompanied their demise. ¹⁰⁵ And arguably, the uncertainty which the judgement in Debbie Bird has unwittingly perpetuated ensures that the issue of retreat is likely once more to arise for their Lordships consideration in the not too distant future.

Rather than leave the question open in some cases to the unpredictable standard of reasonableness, it is submitted that the Court of Appeal would do well to declare an unambiguous rule of law, and to come down in favour of the general liberty to stand one's ground, in the face of attack, homicidal or otherwise. The failure to retreat might well continue to make it difficult for an accused to establish his non-combative posture at the time of the incident, but it would not exclude self-defence in law. In so applying the law in a manner more fair to the accused, their Lordships would further justify the place which private defence has long deserved in the legal system as a plea of full justification, and not a concessionary matter of excuse.

D. The Interpretation of Necessity

As we saw earlier, given that the need for force has arisen, the law requires that the degree of violence employed be no more than necessary to neutralise the attack. Clearly, the more serious the attack, the more likely it is that greater force will be needed in its suppression; the former will thus largely determine the nature of the defence. ¹⁰⁶

While, though, to charge a jury "The question is, - was it necessary?", ¹⁰⁷ is strictly accurate, it is not a complete description of the judicial attitude towards the requirement. For the very nature of private defence situations, the rapidity with which they evolve, the consequent effect of fear on one's judgement, and the difficulty there is in being certain of an effective defence all conspire to render quite unjust - or at best meaningless - the imposition of a rigid standard. The difficulty, particularly in France, is in the choice of illustrative caselaw, and space does not permit a detailed enumeration of all the major cases. However, several decisions from all three jurisdictions form a representative grouping of the state of the law.

1. The General Principle

In England, the decision in *R v Shannon* ¹⁰⁸ is the most recent case in point. There, the appellant, a man with no history of violence, had been convicted of the manslaughter of one M. Both were colleagues in the same firm, and the deceased, a heavily built man with a history of violence who had, according to evidence, expressed threats against the appellant, one day brought things to a head by punching him in the face. A fight of some ferocity then broke out between them. Two colleagues tried in vain to pull M off the appellant, and there was evidence in court that Shannon was being forced down to the ground by his hair, in an extremely dangerous posture. He thereupon stabbed the deceased three times with a pair of scissors, one very hard blow almost killing him instantly, having smashed through a rib and penetrated M's heart.

He appealed against his conviction, on the ground of a misdirection, in that the trial judge had left the jury with the bald question "are you satisfied that the appellant used more force than was necessary in the circumstances." The appeal was allowed. In doing so, the Court of Appeal made it clear that the trial judge had erred in leaving the determination to be made in purely objective terms, for they had thus excluded the state of mind of the accused in the heat of the moment. He had failed to direct the jury that if they:

"...came to the conclusion that the stabbing was the act of a desperate man in extreme difficulties...they should consider very carefully before concluding that the stabbing was an offensive and not a defensive act, albeit it went beyond what an onlooker would regard as reasonably necessary." 199

What counts, in other words, is not what was actually necessary, but as a concession to human frailty rather the lower threshold of what was "reasonably necessary" at the time, and references to this are to be found throughout the case reports and textbooks in England. 190 The words of Lord Diplock, in a case raising not private defence but the prevention of crime, are, it is submitted, equally appropriate in describing the principle by which an accused's actions for the purpose of defending himself should be judged:

"... the jury ... should remind themselves that the postulated balancing of risk against risk, harm against harm, by the reasonable man is not undertaken in the calm analytical atmosphere of the court room after counsel with the benefit of hindsight have expounded at length the reasons for and against the kind and degree of force that was used by the accused; but in the brief second or two which the accused had to decide whether to shoot or not and under all the stresses to which he was exposed." 191

Nevertheless none has yet surpassed the picturesque clarity and powerful simplicity of Justice Holmes's famous dictum: *"Detached reflection cannot be demanded in the presence of an uplifted knife."* ¹⁹²

Scotland

In Scotland, the habit has been more to express the requirement in its bald form, but with the qualification that only "gross" or "cruel" excess in the use of force will defeat the plea. ¹⁹³ In a decision resting on solid authority ¹⁹⁴ the Scottish High Court of Justiciary in Fraser v Skinner, ¹⁹⁵ allowed the appeal against conviction of a police officer who had been convicted of assault in 'palming off' an aggressive individual, for the sheriff had applied too strict a test, much as that in Shannon. *"...it is only cruel excess"* said the court *"which will found a plea of self-defence which is otherwise founded upon the evidence. What the sheriff did was to weigh the matter in too fine a scale..."* ¹⁹⁶

It may be, however, that the court in Fraser v Skinner was moved more by the fact that the appellant was a police officer, for certainly it does appear somewhat isolated within the limited caselaw available. While, if anything, the principle appears at first sight to be more favourable to an accused than the English version, one might doubt the judiciary's willingness to apply the letter of the law in this respect. In Hillan v H.M.A. ¹⁹⁷ the High Court had cause to criticise a sheriff for having applied the rigid test, ignoring Hume's discourse on assault. Lord Justice-Clerk Aitchison repudiated the sheriff's statement that the defence *"must be kept within bounds and must not go beyond the necessity of the occasion"*, declaring that *"it is only cruel excess that will bar the plea"* (original emphasis) ¹⁹⁸ and later, *"... excess in retaliation or self defence must be judged of broadly and not weighed in too fine a scale."* ¹⁹⁹ But, as we have seen, Hillan itself has since been disavowed from the bench. ²⁰⁰ And in a more recent case the sheriff convicted the accused of assault where he had parried a punch then struck in the same manner at his assailant ²⁰¹ - whether such action constitutes "cruel excess" is questionable, and the case certainly runs counter to English authority. ²⁰²

In H.M.A. v Kizileviczius, a murder trial reported in 1938, Lord Jamieson charged the jury in terms much similar to those which were later to be condemned by the English Court of Appeal in Shannon.²⁰³ No qualification was added, while in the later case of H.M.A. v Doherty,²⁰⁴ although the jury was instructed that "*You do not need an exact proportion of injury and retaliation; it is not a matter that you weigh in too fine scales, as has been said. Some allowance must be made for the excitement or the state of fear or the heat of blood of the man who is attacked...*".²⁰⁵ the magnitude of that 'allowance' was not further explained, in a summing-up which was for the rest more objective or restrictive in its terms.²⁰⁶

The most recent Scots authority on the matter, Fenning v H.M.A.²⁰⁷ implicitly upheld the trial judge's charge that it was "cruel excess" that negatived the plea.²⁰⁸ The court thus accepted the principle's application to homicide cases, but significantly, it did so with little warmth, and indeed the concept was described at trial and on appeal in its negative, prohibitive sense.²⁰⁹ Given the views held on the question of retreat, and the generally restrictive tenor of judicial statements on private defence, one may justifiably question whether the High Court is in practice as committed to the concept of 'quasi-objective necessity' as its English counterpart, and it is submitted that the restrictive - if not rigorous - principles enunciated by Hume, particularly in relation to homicide, are very much alive in modern day Scotland.²¹⁰ While expressions pointing to the quasi-objective standard are to be found in the case reports, their treatment is somewhat cursory, and they are often overshadowed by a text worded in terms which do little to press the message home. As we shall see later, Shannon has served to widen the gap between the Scots and English common law, and it is one which the judiciary north of the border seem in no way impatient to narrow.

Indeed, it is the very approach in cases of homicidal ripostes which one would particularly question. There is a certain logic in a reluctance to admit readily of a plea of homicidal private defence without being sure that the means employed were really necessary, given the shedding of blood. However, it is precisely the writer's contention that a more rigorous application of the law is unjust in such cases, for if one accepts that there was a serious attack, fairness and logic militate against demanding of the

defender greater powers of circumspection in those very circumstances where the heat of the situation is far more likely to diminish seriously his or her faculties of perception and self-control.

France

In France, the expression is rarely found in judicial statements, the courts almost invariably speaking in purely objective terms, but there is little doubt that the quasi-objective concept is applied. This is illustrated by a case not dissimilar to Shannon.²¹¹ In the famous decision of Cr 21 novembre 1961 (Devaud)²¹² the facts were that Devaud got into a fight with another customer, Duthier, in a café. During the altercation, Duthier grabbed him by the throat. Devaud, unable to make him release his grip, grabbed hold of an empty bottle, and violently struck him over the head, seriously injuring him. He was convicted of voluntary wounding, the lower court declaring baldly that the use of the bottle "*n'était pas nécessaire*", and the *Cour de cassation* rejected his *pourvoi*.

With respect, the writer would question the rather objective standard which was upheld in the case. While it is undoubtedly true that, in the words of the lower court "*cette bouteille cassée avec violence, équivalait à une arme dangereuse*" he would point out that the fact of being grabbed and held by a sustained grip to the throat similarly constitutes a serious and dangerous attack upon one's person, and one very likely to produce a panic response. A milder riposte might well have disengaged Devaud from the fray, true, but the question is whether he is to be condemned for not having had the presence of mind to attempt it. The writer thinks not. And though the argument used in Devaud that the presence of bystanders served to render such violence unnecessary can sometimes have relevance,²¹³ one may, in addition to questioning whether reliance upon their intervention is to be recommended,²¹⁴ point to the facts of Shannon as a warning to those who would place their faith in the presumed effectiveness of such action.

An even more questionable decision is found in 1 février 1984 (V...).²¹⁵ There, S burst open the locked door of his sister's apartment, having been refused entry, and proceeded to inflict what the lower court

termed "*violences graves*" upon her. Also present was V, with whom she was living, and who had been subjected to threats, and violence against his property by the victim. V fetched his .22 Long Rifle, ²¹⁶ and having vainly warned him to leave, fired one shot. S made off, only to collapse outside on the pavement. Despite the lower court's express recognition of the gravity of the violence, it only found provocation, and V's *pourvoi* against the decision was rejected by the *Cour de cassation*.

Another well-known case is Cr 28 novembre 1972 (Marchal). ²¹⁷ There, one C, a café-proprietor, ejected a group of youths who had become violent on his premises. Notwithstanding this, in the words of the court "*ces jeunes gens sont revenus à la charge*". C went out to calm them, only to see them approaching him armed with stones and flower-pots. He grabbed his shotgun and fired once in the air, whereupon several youths, including M, rushed forward, missiles in hand. C fired again, hitting Marchal in the foot. The decision of the lower court which found him not guilty was upheld by the *Cour de cassation*.

The decision deserves to be fully approved. But it is interesting to note that the case is cited by some writers as a liberal example of the Court's caselaw. And in the light of the above, there are grounds for believing such views, while regrettable, to be descriptively accurate. ²¹⁸

The writer sees nothing "liberal" in such a decision; rather the application of a justice of common-sense. Indeed, the justified shooting of a dangerous attacker - such missiles are dangerous - in the foot hardly demonstrates the point in issue here, for if anything this and other such cases ²¹⁹ indicate a very strict observance of the necessity rule by the defender. Such decisions, furthermore, are all the more regrettable, when one considers that the inquisitorial criminal justice system of France is such that pleas in justification such as private defence, in practice may, and in law ²²⁰ must be examined fully by the various prosecutorial authorities so as to halt all further legal proceedings, if they are found to be made out. ²²¹

Nonetheless, one may cite several lower court cases in which the plea was upheld, where the accused had shot dead an unarmed man who made a leap

at the weapon after a particularly audacious assault; ²²² fired a burst of bullets at a fleeing intruder; ²²³ shot an attacker three times at close range; ²²⁴ and the famous Bastien case, which we examined in the previous chapter, ²²⁵ where the interpretation of the force used was very subjectively based. However, closer inspection will often reveal that the circumstances involved night attacks upon the dwelling or other inhabited property, and as we shall see later, ²²⁶ these instances of private defence have always been accorded a special status in the criminal law of all three jurisdictions.

This is not to say that the *Cour de cassation* never looks indulgently upon the defender in such situations, and indeed in the previous chapter we saw some examples of the Court's understanding interpretation of the posterior limits to private defence, which is clearly tied to the present discussion. Tellingly, though, one of the best examples again involves an officer of the law.

In Cr 20 avril 1982 (*Veuve Diab et autre*) ²²⁷ the facts were that the deceased, a powerfully-built man who appeared to be mentally unbalanced, had been apprehended in the grounds of Versailles hospital after committing acts of violence there. Resisting violently, he was transported to the *commissariat*, but on his arrival proceeded to beat up his escorts with a chair. Alerted by the noise, *sous-brigadier* Marquet intervened. Armed with a service submachine gun he shouted to Diab to stop, which only prompted him to make a momentarily successful grab for the gun, yelling threats against the officer. Marquet issued one last warning and finally, with his back up against the wall, loaded the weapon and fired a burst of shots, fatally wounding D. The *Cour de cassation* declared the *pourvoi* by Diab's widow against the *arrêt de non-lieu* inadmissible.

Yet again, as with so many other cases, ²²⁸ this decision demonstrates the fallacious nature of the argument which, derived from olden days, would require a parity of weapons between attacker and victim. ²²⁹ The very real danger of an unarmed attacker seizing hold of the weapon and thus reversing rôles demands that force should be on the side of the defender. ²³⁰ And more particularly, such a rule confuses evidential issues with those of substance, for there are instances where an unarmed attack will be so severe as to justify a defence with deadly weapons. The courts are right to treat

with greater scrutiny claims of private defence where there is an objective disparity, but the writer cannot approve the *a priori* dismissal of the use of weapons against an unarmed assailant as unjustifiable, ²³¹ for this view appears to ignore, among other things, the realities of many unarmed attacks. ²³² Fortunately, various cases do reveal that the rule cannot be viewed as strict. ²³³ However, so far as Scots law is concerned, if, as is reasonable to suppose, Gordon is correct in his assessment that *"An assault with fists will not justify retaliation with weapons unless in exceptional circumstances"* ²³⁴, then there is reason to presume that Shannon would have been even less fortunate had his trial taken place in Scotland. Yet, the means are ultimately not important. As Ortolan put it, *"l'instrument le plus énergique est souvent celui qui permet d'échapper au péril en faisant le moins de mal. La véritable question est de savoir quel est le mal qu'il est permis de faire à l'agresseur en se défendant."* ²³⁵

The Marquet case is a good illustration of the two notions of necessity described earlier; and particularly relevant here, of "reasonable necessity" in the form of defence. There was clearly a need to use force. However, as to the *amount* of force used, one may doubt whether the four bullets which hit Diab were necessary to halt him. What the *arrêt de non-lieu* rightly shows is that this is not the question. In a situation where an attacker will often have the initiative, and where the time to think may be measured in fractions of a second, it is submitted that the protection which the law affords should be weighed with sufficient certainty as to constitute a fair and effective justification for truly defensive acts. Such sentiments are not based on fanciful hypothesis. The remarkable facts narrated in the questionable case of Cr 26 février 1980 (Abdelkaoui) ²³⁶ where six shots fired in what the writer considers to have been legitimate self-defence failed to neutralise the aggressor and save the defender's life, demonstrate in astonishing fashion the need for certainty in the use of defensive force. ²³⁷

Whether or not the principle is universally applied, its substance is the same - that the courts ideally will take account of the circumstances of the accused in judging his behaviour. Arguably, though, there is ground for thinking that references such as Lord Diplock's - typical of many ²³⁸ - to

the reasonable man inadequately describe the proper test to be applied. 239
Rather than the position of the reasonable man in the circumstances, an analysis centring upon a reasonable man in the position of the accused in the circumstances of the attack would, it is submitted, be preferable.

11. The Rôle of Subjectivism

While detached reflection cannot often be demanded, even of the most reasonable of men, it must be recognised that many individuals are even less well-equipped to deal with physical attack than is the man on the Clapham omnibus - the elderly, the very young, the crippled, and so on. Such persons should, arguably, not be penalised by virtue of an accident of birth, their age or their inexperience in brawling, through the imposition of a uniform standard, as Jousse, for one, recognised over two hundred years ago. 240
And fortunately, there are several cases indicating that in interpreting necessity, the courts are indeed prepared to take account of any special circumstances peculiar to the accused, thus applying, to take one example, the standard of what the reasonable cripple would have been expected to do in the circumstances.

In Cr 20 février 1984 (A...) 241 the facts were that A had gone to the home of G and his wife, insulted them there, and again in the village, then chased after their car in his own vehicle, forcing them to a halt. He dragged G out in order to strike him, and on seeing G's wife get out, grabbed her and made as if to kiss her, biting her on the mouth. G took an iron bar from his car which he normally used as a garden stake and struck him on the head, though A disarmed him and beat him, before being finally restrained by witnesses to the altercation. The lower court, in a decision against which A vainly appealed, found G not guilty of wounding, stating, in the words of the *moyen* that:

"... ce dernier plus âgé de neuf ans que son adversaire pesant dix-sept kilos de moins, ayant l'aspect d'un homme d'étude vieilli et non d'un sportif, ne pouvait à mains nues neutraliser un adversaire dangereux et devait utiliser la seule arme dont il disposait, à savoir la barre de fer servant habituellement de broche sur son terrain et qui se trouvait dans sa voiture; que sa riposte n'avait pas

*été disproportionnée par rapport à l'attaque
et au péril encouru."* ²⁴²

In Cr 25 mai 1977 (Vamo), ²⁴³ the lower court, in upholding the plea of self-defence by a sixteen-year-old youth who had struck a violent drunk in his own defence, seriously injuring him, stated expressly that "*ce jeune adolescent, manquant d'expérience, a pu légitimement craindre que l'ivrogne n'exerce des violences graves sur sa personne...*". The attacker's *pourvoi* against this judgement was rejected. ²⁴⁴

In England, it appears from the case of Shannon for example, where reference was made in the judgement to the respective physical characteristics of each combatant, that courts will take into account personal characteristics, and other decisions do seem to confirm this approach. In R v Sharp and Johnson ²⁴⁵ the appeal concerned a joint conviction for affray, resulting from a ferocious street battle between two individuals. When separated, J was found to have a severe razor wound to the head, while S had teeth knocked out, a black eye, a cut lip and part of his ear bitten off. Their appeal was upheld on grounds not directly related to the present discussion, but it emerges from the judgement that the court accepted the possibility of S's justified use of such a weapon in his own defence, due to his being partially crippled as a result of polio. ²⁴⁶ In Scotland, Hillan perhaps showed the clearest example of such an *in concreto* approach, ²⁴⁷ affirming the view that one has to examine the plea in light of "*all the circumstances*" of each particular case. ²⁴⁸ We lack any recent statement from the bench on this matter, but it is submitted that no court would entirely ignore the special characteristics of an accused in a given case.

It is submitted that the above approach is to be approved. It accords with the reasonable proposition that equality of treatment is best attempted by treating dissimilar cases according to unequal standards. And lest it be objected that the principle is a licence for the use of needless violence, one would point out firstly, that the parameters of private defence which already exist still have force, and are merely imposed according to the varying capacity - within limits - of individuals, to meet the requirements

set by the law. Secondly, this individualistic approach is double-edged, since it allows the courts - as caselaw has shown ²⁴⁹ - to take a stricter view of the use of force by persons who were more able to maintain a command of their actions, judgement and of the situation as a whole. One does not judge a black-belt in karate by the same standard as an ageing victim of poliomyelitis.

Consistent with this "facts and circumstances" approach then, one may argue, as does Ashworth, ²⁵⁰ that the dictum of "detached reflection" is more appropriate to victims of sudden, unexpected attacks, than those which carry advance warning of some sort. And it is significant to note that in Palmer, which we shall consider shortly, Lord Morris did speak of "*unexpected anguish*" (emphasis added) in his analysis of the victim's plight. ²⁵¹ With this view the writer would generally agree, while nonetheless pointing out that such a fact is only one of many circumstances which may be of import in analysing the respective actions of those involved, and one should therefore be wary again of confusing what is largely an evidential factor with a strict rule of law.

Equally, the interpretation of necessity should, arguably, vary according to whether the person applying force is the victim of the attack itself, or whether he is acting in the defence of a third party. As Lepointe pointedly remarked, reminding us of the underlying justification for the quasi-objective approach, "*... on ne peut pas à la fois être "dans" l'action et la regarder du dehors*". ²⁵² Such a guiding principle ensures that the indulgence of the law is shown to the appropriate persons, and in the appropriate degree, rather than applied arbitrarily to all who claim it by mere virtue of their involvement in a violent exchange. Again, though, justice militates against the rigid imposition of a strict rule in such matters.

It will be realised then, that the above interpretation of necessity, which is followed to varying degrees in each of the three jurisdictions, reflects the law's recognition of the plight of the victim of an unlawful attack, who may have little chance to gauge nicely his response in the heat of the moment. That this approach is adopted implicitly disproves the

assertion of some writers that the interpretation of pleas in justification is entirely objective, all subjective considerations being excluded. 253

But just how far does this examination of the accused's own mind go (insofar as such an exercise is possible) ? From the above, there seems little doubt that in Scotland and France, it is of restricted application. Returning, though, to England, there are signs that the judiciary has in recent years been prepared to take it much further. The leading authority for this is the watershed decision of the Privy Council in Palmer v Reginam. 254

Palmer v Reginam

The appellant had been convicted of murder. The facts of the case are not of direct relevance here, but his appeal raised the issue of whether in every murder trial where self-defence was raised, the jury must be directed to return a verdict of manslaughter where the accused had in good faith used force which nevertheless went beyond that which a reasonable man would have considered necessary. After a lengthy consideration of legal principle, the Privy Council dismissed the appeal, in a judgement delivered by Lord Morris of Borth-y-Gest. In the now famous closing passage, his Lordship had this to say:

"... If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be

recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken..." 255

(emphasis added)

The passage is noted for its confirmation of the common-sense, factual analysis of self-defence, and the refusal to bind it into rigid rules of law. And it clearly upholds the "quasi-objective view" described above.

R v Shannon

In reaching its decision in the later case of Shannon 256 the Court of Appeal laid great emphasis upon Lord Morris's dictum, quoting with approval the full passage from which the above is taken. However, there are signs that the court there may have used Palmer in order to set forth a stronger proposition than that which the Privy Council itself laid down. Commenting on the above passage, Lord Justice Ormrod, delivering judgement of the court, said:

"The whole tenor of this statement of the law is directed to the distinction which has to be drawn between acts which are essentially defensive in character and acts which are essentially offensive, punitive, or retaliatory in character. 257

And later,

"(The question is) whether ... in other words, in the circumstances, the stabbing was essentially defensive in character." 258

Permeating the entire judgement is the notion that one should distinguish between acts committed essentially by way of offence and ones

where the accused acted out of revenge, retaliation, and so on. But it is clear that Lord Morris meant the accused's state of mind, his belief and his intention, to be an *evidential* aid to the jury. Certainly, he did say it was "most potent evidence" - but proof it was not. There is no doubt from his words, that the Privy Council intended that a fairly objective link should still ultimately be retained. That "potent evidence" was not supposed to be the final word. Evidence clearly has to be "of" something. And that "something" was, from the passage, the fact that "only reasonable defensive action had been taken." (emphasis added).

Tautologies there may be in law, but Lord Morris's use of the word "reasonable" is decidedly not one. His Lordship clearly accepted the need for some objective core to the interpretation of defensive action, essentially expressing the pertinent point made by Gordon that 'defensive' action may not always fully coincide with what is "reasonable self-defence" in the eyes of the law. ²⁵⁹ However, a reading of *Shannon* does give some grounds for believing that Court of Appeal was not far from elevating the accused's good faith belief into a determinant factor.

Critique

The preceding pages have, one hopes, demonstrated the writer's firm belief that the interpretation of an accused's action's should very much take into account the harsh realities of his plight, more than is presently the case in many courts. However, it is quite another thing to tread with both feet, even cautiously, into the arena of subjectivism in the manner which the Court of Appeal seems to have done. ²⁶⁰ With respect, such an approach is all the more questionable for the paraphrasing by Lord-Justice Ormrod of Lord Morris's remarks in *Palmer*, with the distortion of the sense of his dictum which inevitably resulted:

"... the real issue ... to paraphrase Lord Morris in PALMER v R was 'Was this stabbing within the conception of necessary self-defence judged by the standards of common sense, bearing in mind the position of the appellant at the moment of the stabbing, or

was it a case of angry retaliation or pure aggression on his part." 261

It is submitted that a close examination of Lord Morris's words shows clearly that he did not intend to draw a simple distinction between self-defence on the one hand, and "angry retaliation or pure aggression" on the other, as the Court of Appeal suggests. There is indeed a middle area, that of action taken in good faith, but in circumstances which displayed a breach of the requirements of private defence, even when interpreted in terms of "reasonable necessity". While Palmer's ultimate rejection in such cases, of the disputed doctrine of "excessive self-defence" (around which the case turned) has been criticised, what the two schools of thought on this particular doctrine do not contest, is the existence of this 'middle-ground'. It is indeed the writer's belief that the reasoning in Shannon may actually have indicated an attempt to 'plug the gap' as it were, given the rejection of the doctrine, a subject to which we shall return later. However, leaving aside the particular facts of the case, what the writer would question is the notion that an *acquittal* in such circumstances is appropriate. If good faith is to be elevated from an evidential status to a full defence or plea in justification, then let this be clearly stated - and let it not be confused with, or portrayed as, private defence. 262

The Court of Appeal therefore seems to have misunderstood, or otherwise disregarded, the true meaning of Palmer. The irony, though, is that the appeal could well have been allowed on the basis of what is contended here to have been the correct message of the Privy Council's judgement. Shannon's appeal was successful precisely because the trial judge had wrongly stated the necessity requirement in largely bald terms. The case could therefore easily have been decided without the extension to the law which is suggested from the judgement of the court.

It may possibly be easy to make too much of the decision in Shannon. It does however fit in with the general relaxation we have seen in English law in recent years, and the changing attitude towards unreasonableness in matters of private defence, such as in the case of Gladstone Williams. 263 Tellingly, in Attorney General's Reference (No. 2 of 1983) 264 a court

composed of two of the three judges who decided Williams 2nd omitted the word "reasonably" before referring to the appellant's belief in the amount of force necessary to repel an attack upon him and his property, and there is little ground for believing that this was an oversight. The irony is that from the olden days when self-defence was, regrettably, viewed more as subjective-oriented excuse, the defensive rights of the victim in situations of conflict are being developed by the courts with the aid of strongly subjective factors. We may await with interest an appeal which calls for a precise determination of just what the Court of Appeal meant in Shannon.

APPENDIX

1. People v Keatley (1954) IR 12, 16 (see also 17). The point is also explicitly recognised by Decocq, A., *supra*, p.320 and Légal, A., RSC 1958 841, 842.
2. Often in its fuller version, with judges speaking of the accused acting either within or outwith "*la nécessité actuelle de la légitime défense*".
3. E.g. Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, p.350; Bouzat et Pinatel, *supra*, Vol. 1, 360-1; Merle et Vitu, *supra*, 517.
4. Robert McAnally (1836) 1 Swin. 210; Hillan v H.M.A. (1937) JC 53 (sheriff); H.M.A. v Kizileviczius (1938) JC 60, per Lord Jamieson at 63; H.M.A. v Doherty (1954) JC 1, per L. Keith at 4; Fenning v H.M.A. (1983) SCCR 219; Connorton v Annan (1981) SCCR 307 (Sheriff Schiach); Hanway v Boulbee & Ux. (1830) 1 M & Rob. 15, 18; Lewis v Arnold (1830) 4 Car. & P. 354, per Tindal, C.J. at 356; R v Bourne (1831) 5 Car. & P. 120, per Parke, J. at 120; R v Driscoll (1841) Car. & M. 214, per Coleridge, J. at 214; R v Weston (1879) 14 Cox C.C. 346, per Cockburn, C.J. at 351; R v Rose (1884) 15 Cox C.C. 540, per Lopes, J. at 541; R v Morse (1910) 4 CAR 50, per Darling, J. at 51; Brown v U.S. (1921) 65 Law Ed. 961, per Holmes, J. at 963; Mancini v D.P.P. (1940-42) 28 CAR 65, per Viscount Simon at 72; R v Sharp & Another (1957) 1 All ER 577, per L. Goddard, C.J. (djc) at 580; R v Vardrope (1960) Crim.L.R. 770 per Edmund Davies, J.; R v Chisam (1963) 47 CAR 130, per L.C.J. Parker at 133; Palmer v R (1971) 1 All ER 1077, per L. Morris (djc) at 1088; Attorney-General's Reference (No.2 of 1983) (1984) 1 All ER 988, per L.J. Lane (djc) at 993; R v Williams (1984) 78 CAR 276, per L.C.J. Lane (djc) at 279; R v Jackson (1985) RTR 257, per trial judge cited per Park, J. at 262; R v Shannon (1980) 71 CAR 192. Rowe v Hawkins 1 F&F 92, per Crowder, J.; Hume, 1, 217, 226-7; Alison, 1, 20, 134; MacDonald, *supra*, 106-7; Anderson, *supra*, p.17; Gordon, G.H. *Criminal Law of Scotland*, *supra* p.760.
5. For the rationale of private defence does not lie in either punishment or revenge.
6. See eg Hume, 1, 227; also, Le Sellyer, *supra*, 262.
7. We therefore see that the two meanings of "necessity" described here are not entirely distinct and independent of each other, since the unnecessary continuation of force in effect highlights the fact that the posterior limits of private defence have been reached - indeed breached - and that there is no longer any real attack. *Supra*, Chapter 1.
8. For example, by the threat of paternal sanctions, such as disinheriting his daughter.
9. *Infra*, Chapter 4.
10. See for example the matter of retreat, *infra*.
11. See Coke, III, c.8, p56; Hale, 481; Hawkins, I, p71.

12. Indeed, the element of irrationality in such a situation further militates in favour of a firm response, suggesting as it does the presence of an unpredictable and particularly dangerous aggressor.
13. Nor did the jury in Cour d'assises de la Loire 28 janvier 1920, cited Bouzat et Pinatel, *supra*, Vol 1, p.363.
14. For a similar example of this confusion, see Gordon, G.H. *The Criminal Law of Scotland* 2nd edition. (Edinburgh, 1978) p.762.
15. Williams, G. *Textbook*, *supra*, p.505.
16. See *supra* Chapter 1.
17. E.g. Ortolan, J. *supra* p.177; Decocq, A., *supra* p.320; see also Anderson, *supra*, p.17.
18. See Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra* p.348; Bouzat et Pinatel, *supra* Vol. 1 p.361. See also *supra* Chapter 1 on 'Preventive Defence'.
19. For some illustrations of these strains - and their consequences - see Tribunal de Grande Instance d'Aix-en-Provence 21 mars 1968 GP.1968.2.67 (Vinas); T.C. Lyon 16 octobre 1973 JCP.1974.II.17812 note Bouzat (M.P. et Djezzar Omar c Vernet) - where the accused, a garage-owner, had even offered the police free petrol in a vain attempt to ensure protection for his business - and the remarkable facts surrounding the decisions of Tribunal Correctionnel de Troyes 24 mai 1978 (2 jugements) and Cour d'appel de Reims 9 novembre 1978 (2 arrêts), reported in JCP.1979.II.19046 note Bouzat.
20. At least in name; see eg *R v Abraham* (1973) 3 All ER 694; *R v Julien* (1969) 2 All ER 856; *R v Wheeler* (1967) 3 All ER 829; *H.M.A. v Kizileviczius* (1938) JC 60; cf. *H.M.A. v Carson & Anr.* (1964) SLT 21, where Lord Wheatley charged the jury using the terms "excused" and "justified" in the same passage.
21. Although strictly speaking such a view would be difficult to explain in juridical - as opposed to policy - terms.
22. See however *Turner v MGM* (1950) 1 All ER 449; *Hillan v H.M.A.* (1937) JC 53 per LJ-C Aitchison at 59, per Lord MacKay at 62; Cr 23 juin 1887 B.C. no.237 (Cazalets et Pescetti).
23. There is again an analogy with the topic of defender-precipitated attacks. For in those cases one separates the issue of private defence from that of liability for the initial assault by which an accused precipitated an excessive riposte against him, which in turn forced him to use defensive force.
24. (1972) Crim.L.R. 256.
25. Self-Defence and the Right to Life (1975) CLJ 282.
26. *Id.* at 296.

27. See Dicey, A.V., *The Law of the Constitution* 8th edition, 1915 pp.495-6. He gives the example of a person whose undoubted right to walk along a footpath is unlawfully challenged by someone who threatens him with violence should he go along the path. Dicey thinks that the individual should make a detour and refrain from exercising his public right. With this the writer cannot agree, and he would further point out that Dicey appears to commit the same error as that made by Professor Gordon in his comments on the defence of 'property' at p.762 of his 2nd edition (and criticised earlier by the present writer); See also Robinson, P.H. *Criminal Law Defenses*, St. Paul, Minnesota 1984, p.87 and footnote 63, where the author cites some American jurisdictions which "refuse to justify deadly force where the actor knows he can safely avoid it 'by complying with a demand that he abstain from performing an act which he is not obligated to perform.'"
28. See particularly the early views surrounding the duty to retreat in an altercation, *infra*.
29. *State v Bristol* (1938) 53 Wyo. 304, cited Ashworth, A.J. (1975) CLJ 282, 295.
30. (1972) Crim.L.R. 256, 257. And see Halsbury's *Laws of England*, Vol. II, *supra*, para. 1180.
31. (1882) 9 QB 308.
32. (1972) Crim.L.R. 435, 436. The commentator bases his suggestion on the principle of reasonableness which, as we shall see later, forms the litmus test for private defence - certainly in English law. Consequently, runs the argument, if the only reasonable course of action was to retreat, then to act as Field did "would be to use unreasonable force." It is submitted that at the root of the above proposition lies a fundamental confusion as to the precise meaning of the basic principle of private defence in English law. Reasonableness refers, and always has referred, to the defensive act itself; not the lead-up to it, as in *Field*. It is the standard by which the weight of the defender's actual blow is to be judged, as it were. Where reasonableness comes in, if at all, would be in determining whether at the point of attack (actual or imminent) the appellant should have retreated, rather than fight - not in deciding whether his plea was void on the basis of his activities some time before the altercation arose. In its affirmation of a clear principle of law, distinguishing the rule regarding freedom of movement, from the standard of reasonableness applicable to the defensive act, the decision in *Field* is to be approved. As to the issue of retreat, see *infra*.
33. *Théorie du Code pénal* 5ème édition, Paris 1872, Vol. 4, p.185. The expression is found in a discussion directed more particularly towards the question of retreat at the moment of attack, but it seems clear that the principle expressed was intended to be of general application.
34. Cf. Smith and Hogan's pointed criticism (*Criminal Law supra* pp.327-8) of Lowry, L.C.J. in *R v Browne* (1983) NI 96 at 107. The authors state "Even if he did foresee the attack, he may still be entitled to act in self-defence if he did not intend it. D intervenes to stop P from ill-treating P's wife. He knows that P may react violently. P makes a

deadly attack on D. Surely D's right of self-defence is unimpaired." Once more we see traces of the idea that private defence is rooted in excuse, in judicial statements.

35. Decocq, A. *Droit Pénal Général*, *supra*, p.320.
36. Sieurac, F. *La Légitime Défense* (thèse) Toulouse, 1896, pp.67-8; Priolaud, A., *Du Droit de Légitime Défense* (thèse), Angoulême, 1903, p.88.
37. Gèze, H., *De la Légitime Défense et de ses Rapports avec la Provocation* (thèse) Toulouse, 1904, p.88: "La prévision d'une attaque ne peut m'enlever ma liberté d'action." see also Le Sellyer, A.-F., *Traité de la Criminalité ... supra*, p.260. While the latter's discussion is directed more to the question of retreat at the moment of attack, the whole import of his words suggests a strong disinclination to accept the notion that a citizen may be kept off the streets by the threat of attack.
38. *Infra*.
39. Professor Decocq (*Droit Pénal Général*, *supra*, p.319) does refer to the question, but cites no authority on this particular point, and expresses no opinion on the matter.
40. See in particular the recent English cases discussing the issue of the alleged duty to retreat, culminating most recently in that of *R v Debbie Bird* (1985) 81 CAR 110; *infra*.
41. The year the *Code pénal* was promulgated.
42. See for example, Priolaud, A., *Du Droit de Légitime Défense*, *supra* p.88 and Lablancherie, M., *La Légitime Défense* (thèse), Bordeaux, 1909, p.74.
43. See for example the famous *Ordonnance de Louis XIV* given at Saint Germain-en-Laye in August 1670, Article 4 of which stated: "Ne seront données aucunes Lettres d'abolition pour les duels, ni pour les assassinats préméditez, tant aux principaux auteurs, qu'à ceux qui les auront assistez, pour quelque occasion ou prétexte qu'il puissent avoir été commis, soit pour venger leurs querelles, ou autrement ..." See Serpillon, *Code Criminel ou Commentaire sur Ordonnance de 1670*, (Lyon, 1767) p.766. These "lettres d'abolition", obtained from the sovereign, were crucial in the recognition of private defence, and if an accused was to escape punishment. It seems, though, that they were given as a matter of course, once private defence was established. See also Priolaud, A. *Du Droit de Légitime Défense*, *supra* p.88; Lablancherie, M., *La Légitime Défense*, *supra*, p.74.
44. B.C. no.161.
45. "Attendu ... Que si, du silence de la loi pénale, on doit induire que le duel, tout contraire qu'il soit à la religion, à la morale et à la paix publique, n'est passible d'aucune peine". See also the *attendus* of the lower court decision which was contested in *Cr 29 juin 1827* B.C. no.184, cited in the closing speech of Dupin: *Réquisitoire de M. Dupin prononcée à l'audience de la chambre criminelle du 22 juin 1837* (Paris, 1837) p.6.

Dupin alleges this to be contrary to the jurisprudence of the Cours royales (i.e. Cours d'appel) of Paris, Montpellier, Toulouse, Limoges, Douai, Aix, Amiens, Nancy, Metz and Colmar: see *Réquisitoire de M. Dupin*, *supra*, p.20 (cp. Lablancherie, *supra* p.76). He refers, furthermore, without citation, to a case the following year which involved the *chambres réunies* (i.e. plenary session) of the Cour de cassation, confirming its earlier decisions.

46. B.C. no.184.

47. *Supra*.

48. Speaking (p.17) of one of the drafters, M. Treilhard, a member of the Conseil d'Etat: "On lui demandait pourquoi ils n'avaient pas nominativement parlé du duel: "Nous n'avons pas voulu, dit-il avec cette brusque énergie qui le caractérisait, et que plusieurs d'entre vous peut-être lui ont connue; nous n'avons pas voulu lui faire l'honneur de le nommer."

See also the words of Barbeyrac, the translator of Pufendorf, *Le Droit de la Nature et des Gens*, *supra*, who annotated the text thus (*supra* Bk.II, Ch.V, §IX, p.296 (fn3)): "Il n'est pas nécessaire, à mon avis, que les Loix défendent expressément les Duels, pour qu'on puisse les regarder comme des Combats illicites, où celui qui tue son homme est toujours un véritable Homicide. Cela suit de la Constitution même des Sociétés Civiles."

49. Thus confirming the somewhat contested argument of Monseignat, one of those who had been responsible for the very drafting of the Code pénal, who asserted that in the absence of a special provision, their place lay simply within the standard provisions of the Code (see Lablancherie, M., *La Légitime Défense*, *supra*, p.74, and Sieurac, F., *La Légitime Défense*, *supra* p.88-89.): "Attendu que, si aucune disposition législative n'incrimine le duel proprement dit, et les circonstances qui préparent ou accompagnent cet acte homicide, aucune disposition de loi ne range ces circonstances au nombre de celles qui rendent excusables le meurtre, les blessures et les coups ..." See also the splendid words of Locré, cited by Lablancherie, *supra*, pp.76-77.

50. "Attendu ... Que si, néanmoins, malgré le silence de la loi et le vice radical d'une telle convention, on pouvait l'assimiler à un fait d'excuse légale, elle ne saurait être appréciée qu'en Cour d'assises, puisque les faits d'excuse admis comme tels par la loi ne doivent point être pris en considération par la chambre du conseil et les chambres d'accusations, et ne peuvent être déclarés que par le jury."

51. "Attendu que si la législation spéciale sur les duels a été abolie par les lois de l'Assemblée Constituante, on ne saurait induire de cette abolition une exception tacite en faveur du meurtre commis, des blessures faites et des coups portés par suite du duel; Que, sous le Code des délits et des peines de 1791, les meurtre, blessures et coups étaient restés sous l'empire du droit commun"

52. See the words of Dupin (p.13): "La différence entre l'ancienne et la nouvelle législation est donc bien marquée: l'ancienne admettait le droit commun de répression pour les vilains, et une législation

exceptionnelle pour les nobles; la nouvelle n'admet plus d'exception, elle établit un droit commun uniforme pour tous." (original emphasis) and later (p.24): "Or, en 1791, qu'y a-t-il eu d'abrogé ? L'exception, sans doute, mais non pas la règle" For an explanation of the historical background to the exception, see Dupin, *Réquisitoire*, supra, pp. 9 et seq.

53. According to Lablancherie, *N.*, *La Légitime Défense*, supra p.76. See for example Priolaud, A., *Du Droit de Légitime Défense*, supra p.89. Priolaud however did agree with the notion that self-defence should be excluded.
54. The decision was reaffirmed six months later in Cr 15 décembre 1837 (Pesson) B.C. no.430, again, ironically, a decision of the *chambres réunies*.
55. Institutes, III, c.72, p.157.
56. P.C. 479.
57. *Crown Law*, supra p.297.
58. *New Commentaries*, supra p.105, citing Hale.
59. Stephen, *General View*, supra p.122.
60. See also *R v Taylor* (1875) 13 Cox C.C. 68; *R v Knock* (1877) 14 Cox 1. In *R v Young & Ors.* (1866) 10 Cox C.C. 371, Bramwell, B. indicated that sparring in itself was not unlawful - but that was in effect a case of boxing, and the circumstances of the fatal incident in question bore all the hallmarks of a sporting occasion gone wrong, nothing more.
61. See Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 41st edition, (Mitchell, S., ed.) London, 1982, p.1406.
62. I, 53; c.f. MacDonald, supra, p.124; Dunedin, *Encyclopædia*, supra, p.86. The identity of the challenger was irrelevant: Hume, I, 230; Alison, I, 53; Burnett, 50. The Act 1600 "Anent Singular Combats" punished with death the fighting of duels irrespective of any fatal outcome; it did differentiate between the respective rôles of the combatants - but only in that the provoker "suffered a more ignominious death".
63. I, 230: "If this is not even a case of murder (and I rather think it is so,) ..."
64. Supra, 49-50. The author also states (p.52) that all 'seconds' in fatal duels are guilty art and part of murder; cf. Serpillon, *Code Criminel*, Article IV. Gordon (*Criminal Law of Scotland*, supra p.758 fn.52) cites the case of David Landale (1826) Shaw 163 as authority for the proposition that the reluctant partner in a duel might succeed in a plea of self-defence "despite Hume's refusal to countenance the plea in cases of duelling". However, all that Landale decides is that while killing in a duel presumes malice, this may be contradicted by the evidence, such as to preclude a finding of guilt on a count of murder. The case does not hold that an acquittal on all charges of homicide is open.

65. Blackstone, *Commentaries*, *supra*, Vol.IV p.214; Coke, *Institutes*, III, c.8 p.55: "And so it is, if they had upon that sudden occasion gone into the fields and fought, and the one had killed the other: this (as hath been said) had been but Manslaughter, and no murder: because all that followed, was but a continuance of the first sudden occasion, and the heat of blood kindled by ire was never cooled, till the blow was given ..."
66. Foster, *Crown Law*, *supra* p.297.
67. *Supra*, p.48. Burnett cites both Foster and Blackstone in support of the distinction.
68. I, 109: "... their rules are entirely at variance with our practice."
69. I, 230, and see the cases cited pages 231-2.
70. (1972) *Crim.L.R.* 435, *supra*.
71. Robert Robertson 4th August 1673: Hume, I, 230. Burnett (I, 51-2) offers the case in support of the distinction he would draw between this situation and a normal duel. However, on his own admission, the Court found the indictment relevant notwithstanding the defence (although the Public Prosecutor did not pursue the matter further).
72. *Supra*, Chapter 1.
73. In *R v Knock* (1877) 14 Cox 1, Lindley, J. told the jury (p.2) that in order to distinguish between self-defence and fighting, "The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting." Insofar as these words convey the idea that the initiative in the threat or actuality of violence should not come from the accused, they merit approval. However, they might be capable of misleading a jury, if there were a case, say, involving previous ill-will between the parties. Satisfaction as to the proceedings and outcome of the affray on the part of the defender could perhaps lead them mistakenly to exclude the possibility of private defence. Cf. the words of Lowe, J in *R v McKay* (1957) VR 560, 565.
74. As opposed to one's chastity etc.
75. "To give or receive a challenge, intended to produce a subsequent combat with mortal weapons, in cool blood, savours of the principle of revenge..." Alison, *supra*, I, 54 (original emphasis).
76. *Institutes*, III, c.72, p.157. See also the words of the Cour de cassation in Pesson (22 juin 1837 B.C. no.184, *supra*: "Attendu ... Que c'est une maxime inviolable de notre droit public que nul ne peut se faire justice à soi-même; que la justice est la dette de la société tout entière, et que toute justice émane du Roi ..., au nom de qui cette dette est payée;"
78. B.C. no.184. See also Cr 15 décembre 1837 B.C. no.430 (Pesson) (chambres réunies).
79. *Réquisitoire*, *supra* p. 12.

80. E.g. Hume 1, 230; Alison 1, 53; Hale PC 479; Blackstone, Commentaries, 208; Stephen, New Commentaries, supra 105; See Serpillon, Ordonnance de Louis XIV supra Tit. XVI. Art. IV refused lettres d'abolition "...ni pour les duels, ni pour les assassinats premeditez...".
81. Several authors refer to the great difficulty in getting juries to convict in such cases. See Alison 1, 55 citing cases from Burnett; Lablancherie, supra 78; Priolaud, supra 89.
82. Professor Williams (Textbook, supra 583) refers to some of the reasons for making such fights criminal: They "involve the appreciable possibility of causing more injury than the combatants intend or contemplate. They tend to occasion apprehension among members of the public and can spread into wider disorder; and the police in putting them down may themselves be injured. Moreover, when the giving and accepting of challenges to fight are socially allowable, the acceptance of a challenge is apt to be forced on a man as a matter of "honour"."
83. "Gone are the days therefore, when it was safe to assume that the settlement of an argument by means of consensual combat properly supervised was anything other than proper ... It is submitted that the intrusion of the criminal law into this area is not only unduly paternalistic but also brings with it some uncertainty." MacKay, R.D. *The Conundrum of Consensual Combat* (1982) 98 LQR 356 at 357 commenting the case of Reference by the Attorney-General under s. 36 of the Criminal Justice Act 1972 (No. 6 of 1980) (1981) 73 CAR 63. Such words however are not necessarily a denial of the impropriety in the eyes of the criminal law of consensual combat. Either way, though, it may be pointed out that one should not confuse the difficulties of policing and the exercise of prosecutorial discretion, with the legality of a particular act. Even if any such period did ever exist, the writer, with respect, does not share MacKay's regret over its passing.

MacKay questions whether the prohibition of such fights is "in the public interest...irrespective of the fact that no serious injury is likely to result." The present writer thinks it is. Firstly, one would question at what point MacKay would draw the line in determining when "seriousness" is reached. Secondly, what if a 'mild' combat ended with the death, quite unforeseeable, of one of the participants? Is this to be viewed as a simple misfortune, a mere mishap? The utter needlessness of the initial combat, and the sheer avoidability of the death in question urge rejection of any such proposition.

See also the words of Professor Gordon (*The Criminal Law of Scotland*, 1st edition, 1967, p.774): "If A and B fight each other they cannot be guilty of assaulting each other, so long as neither exceeds the degree of violence consented to or permitted by law." This submission was expressly rejected by the High Court of Justiciary in Smart v H.M.A. (1975) 30, 33. "An assault is an attack on the person of another. Evil intention is of the essence of assault...".

84. See eg Smart v H.M.A. (1975) JC 30 and Reference by the Attorney-General under s. 36 of the Criminal Justice Act 1972 (No. 6 of 1980). The latter approached the issue from a different angle than the High Court of Justiciary, but in practice its effect is to criminalise virtually all (non-sporting) consensual combat.

85. It is submitted that it is quite irrelevant who struck the first blow. This would only be of import where one of the participants had, say, only turned up in order to demonstrate his unwillingness to fight, and was nevertheless attacked.
86. Clearly, though, the right, if not duty, of a third party to intervene in the prevention of crime, and attempt to end the altercation by the use of force, would remain unaffected.
87. (1954) J.C. 1.
88. Id. at 5.
89. (1975) J.C. 30.
90. Id. per L.J.-C. Wheatley (d.j.c.) at 34.
91. Particularly in relation to the question of the definition of assault, and the place which consent occupies within the concept. For an interesting discussion of the case, and its implications, see Gordon, G.H. *Consent in Assault* (1976) 21 J.L.S.S. 168. However, of more immediate relevance is a possible confusion regarding the supposed link between issues of consent and issues of private defence. In Smart, after a lengthy discussion of the consent question, the court stated its rejection of the possibility of private defence. Now, if the decision proceeded from the analysis on consent, then it was arguably wrong in its foundation, though correct in its result. Consent is irrelevant regarding the *constitution* of the crime of assault, because the consent of one's opponent is no defence to the charge of assault one faces, according to Smart. However, it is also irrelevant in relation to the *justification* of the crime, because one's own consent is no answer, for reasons of both principle and policy. The two issues, consent and private defence, are indeed connected. But they are nonetheless distinct issues and should not be confused.
92. See for example the discussion relating 'defender-precipitated attacks' *supra* Chapter 1; and the examination of R v Field (1972) Crim.L.R. 256, *supra*.
93. *Supra*, at 34. Lord Justice Clerk Wheatley's statement that "...the sheriff was fully justified in directing the jury that there was no relevant evidence to support the plea of self-defence" (emphasis added), and his earlier comments on the sheriff's action (p. 32) would, it is submitted, appear to lend weight to this argument.
94. (1954) J.C. 1 at 5, quoted *supra*.
95. (1981) 73 CAR 63.
96. Id. by the Lord Chief-Justice at 66: "...wherever (the fight) occurred, the participants would have been guilty of assault (subject to self-defence) if (as we understand was the case) they intended to and/or did cause actual bodily harm."

On consent, the court in Attorney-General's Reference (No. 6 of 1980) declined to follow the view expressed by the High Court in Smart.

Instead, the starting premise was that an act which was consented to was not an assault. However, it went on to say that at some point, the public interest steps in, applying the criminal law. That point was reached, and an assault was committed if actual bodily harm was intended or caused. As the Court of Appeal admitted, "This means that most fights will be unlawful regardless of consent." Given this, whatever the theoretical differences between this decision and that in *Smart*, the net result in practice would appear to be not much different. For criticism of this case see MacKay, R.D. *The Conundrum of Consensual Combat*, *supra*.

97. See Article 2 of the Convention.
98. Hence, failure to retreat would presumably breach the requirement that the need for force at all must be shown. By backing off, this could be avoided. Equally, even assuming the need for some defensive action, then one would have to retreat, on the principle that between two courses of action, both effective in neutralising the aggressor, then one should use the one which inflicts the lesser harm. See also Dicey, A.V., *The Law of the Constitution*, *supra* p.492: "... a person attacked, even by a wrongdoer, may not in self-defence use force which is not "necessary" and ... violence is not necessary when the person attacked can avoid the need for it by retreat; or, in other words, by the temporary surrender of his legal right to stand in a particular place - e.g. in a particular part of a public square, where he has a lawful right to stand."
99. This argument is favoured by Ashworth, in his "human rights" approach to the plea of private defence. See *Self Defence and the Right to Life* (1975) CLJ 282, 289 et seq.
100. E.g. *The Duty of Retreat from Deadly Assault* (1930) Oregon L.R. 469, per Durgan, W.T. at 477-8.
101. *Springfield v State* 96 Ala. 81, 11 So. 250 (1892). See also Beale, J.H., *Retreat from a Murderous Assault* (1902-03) Harvard L.R. 567, 581: "A really honourable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill." See also (1930) Oregon L.R. 469, per Herndon, R.L. at 473: "It may be an indignity to retreat, but would it not be a far greater breach of dignity to engage in a deadly combat and unnecessarily kill another?" Grotius, *Le Droit de la Guerre et de la Paix* (trans. Barbeyrac) *supra* Bk. II, Ch.I, § X, no.4, p.216: "... La raison qu'ils alleguent, c'est que la fuite est honteuse, sur-tout pour un Gentilhomme. Mais il n'y a point ici de véritable deshonneur; ce n'est qu'une vaine imagination, qui doit être méprisée de tous ceux qui ont à coeur la Vertu & la Sagesse."; Pufendorf, *Le Droit de la Nature et des Gens*, *supra*, Book II, Ch. V, § XIII, p.300: "La fuite n'a rien alors de honteux, ni d'indigne même d'un homme de guerre, puisqu'on ne s'y porte point par lâcheté, ou contre son devoir, mais pour obéir à la Raison ..." Note, though, that the writers speak of the case of a homicidal riposte.

102. See Ashworth, *supra* (1975) CLJ 282, 303: "If the real thrust of the argument is that retreat and the avoidance of conflict is dishonourable, then it is not self-defence but the defence of self-respect which is in issue."
103. See e.g. *The Duty of Retreat from Deadly Assault* (1930) Oregon L.R. 469, per Stadelman, G. at 482 et seq.
104. *Criminal Law, supra*, p. 327. The authors cite the cases of *Daylin v Armstrong* (1971) NI 13, and *Chisam* (1963) 47 CAR 130, in support.
105. *Supra*, Chapter 1.
106. Robinson, P.H., *Criminal Law Defenses*, St. Paul, Minn, West Publishing Co. (1984) p.80.
107. See e.g. Le Sellyer, *supra*, p. 260: "... s'il est sage, et s'il peut être conforme à la conscience, de fuir lorsque la fuite suffit pour éviter le danger dont on est menacé, et s'épargner la triste nécessité de tuer l'agresseur, cependant, la loi n'en a pas fait un devoir."; Gèze, H, *De la Légitime Défense et des ses rapports avec la Provocation*, *supra*, p.85; Priolaud, A., *Du Droit de Légitime Défense*, *supra* p.97.
108. See e.g. *R v Pitts* (1842) Car & M 284; *Curley* (1909) 2 CAR 96 and 109.
109. Both Priolaud, *supra* p.96 and Stadelman ((1930) Oregon L.R. 469, 486) point to this factor as militating against a duty of retreat.
110. See e.g. Le Sellyer, *supra*, p. 260: "... En effet, il est certain que j'ai le droit d'être dans le lieu où l'agresseur vient me trouver. J'ai le droit d'y rester tant qu'une autorité légitime ne m'enjoint pas d'en sortir; j'ai donc, par cela même aussi, et sans être obligé de fuir, le droit de repousser par tous les moyen nécessaires, celui qui m'attaque."
111. A legal system which lays down such a rule of law might be open to criticism for 'buying now', only to have the future victims of crime pay later. This short-term approach would if any thing, do little to prevent crime, and it is arguably wrong to bring in the interests of society to bolster arguments in support of a duty to retreat, for such a rule surely does not further these interests in the long term.
112. Ashworth argues however ((1975) CLJ 282, 291-2) that the use of such arguments "... fails to establish the point that citizens should play a more physical rôle, as opposed to making fuller use of their powers of observation and informing police of suspicious circumstances." However, to this there are at least two major objections. Firstly, it is arguable that both public policy and present shortages of police manpower still could not, even with increased public assistance, meet the need for the fullest possible protection against the effects of crime. In all three jurisdictions the democratic process has resisted the transformation into a police state. But in any case, the second objection is, with respect, that the above suggestion fails to meet the point. For it appears to ignore the fact that both increased public vigilance or co-operation with the authorities, and a more liberal stance on private defence than a strict duty to retreat are

complementary. One may well argue that public spiritedness should be more keen. But any spread in this worthy attitude should not be seen as an excuse for limiting the stop-gap measure which private defence represents. The one is more long-term in its application, while private defence is a short-term measure taken in the immediacy of a particular situation of conflict.

113. *Recent Decisions* (1922) 21 Mich. L.R. 99 - see (1930) Oregon L.R. 469, at 487 footnote 13, cited by Stadelman, G.

114. Priolaud, A., *supra*, p.74; Lablancherie, M., *supra*, p.60; Gèze, H., *supra* p.86; Decocq, A., *supra* p.320 (though there seems to be a certain ambiguity and contradiction in the writer's discussion of the matter); Merle, R. et Vitu, A., *supra* p.517; Decocq, A., *supra*, p.320; Fuzier-Herman, *supra*, T. 26 *Légitime Défense*, no. 35; Garçon, *supra*, A 328 no.26; Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, p. 350 (on an *a contrario* reading); contra Ortolan, J. *supra*, p.179. Many writers however qualified this where the attacker was insane, drunk, infirm, or a child, parent or spouse of the defender (see Priolaud, *supra*, p.74; Lablancherie, *supra*, p.60, 72; Gèze, H, *supra*, p.87; Stéfani, Levasseur et Bouloc, *supra*, p.350; Cheaveau et Hélie, *supra*, p.184: "... le prétexte de la honte n'est pas un obstacle à cette fuite."; Garçon, *supra*, A 328 nos. 26, 96. Professor Bouzat states enigmatically (*Traité*, Vol. 1, p.361): "... celui qui est attaqué n'est pas toujours tenu de se sauver ...". Could it be, then that the learned author had in mind such cases as the above, as qualifications of a generalised liberty of non-retreat ?

However, it seems to the present writer that such instances may not always be entirely appropriate , for it may well be that in the case of a child, or an infirm person, the point is that there is no real danger in the first place. So far as insane attackers are concerned, one hesitates to speak of a duty to retreat. Indeed, in cases of serious attack, this factor would arguably work to render almost meaningless any such duty, since the very circumstances are if anything more likely to make safe retreat impossible, or at least unlikely to be appreciated by the defender. The fear which the unpredictability and possibly the degree of the violence may arouse in the mind of the defender, as well as the knowledge of the attacker's mental state may be grounds for not imposing such a duty - which begs the question of why the exception should be created here. The argument is really based on the notion that one should act out of tenderness to the attacker, who is "mad rather than bad" - but just how the circumstances of an aggression by a psychotic attacker would enable the victim to do so is not at all clear to the writer. He cannot therefore agree with Garçon's assertion (*supra*, A 328 no. 96) that failure to retreat in such a case would make the killing unlawful.

The writer does think, however, that the principle might be applicable in the case of a mild assault. Given this, it is submitted that the words of Professors Merle et Vitu, *Traité*, T.1, p.517 n.3. are to be preferred: "... on ne saurait, même en ce cas, poser de règle absolue." See also Delmas-St. Hilaire (*Jurisclassseur Pénal, Faits Justificatifs*, no.137). Note that Garçon, Stéfani et al, and Bouzat all seem to found the use of defensive force against an insane attacker upon the plea of necessity and not private defence.

115. See for example no less an authority than Garçon, *Code Pénal Annoté*, *supra*, A 328 no. 26.
116. See Muyart de Vouglans, *Institutes au Droit Criminel* (Paris 1757) p.10; *Les Loix Criminelles de France*, (Paris, 1780) p.33; Jousse, *Traité de la Justice Criminelle de France* (Paris, 1771) p.512-13; du Rousseaud de la Combe, *Traité des Matières Criminelles* (Paris, 1788) p.83. There was however an exception for both nobles and members of the military, for

whom retreat was a matter of shame - see *Muyart de Vouglans*, *id*, and *Jousse*, *supra*, p.513.

117. L.80-92.819.

118. "Attendu que la Chambre d'accusation a repoussé le moyen de défense de la Dame Abadie soutenant qu'elle s'était trouvée en état de légitime défense; que l'arrêt énonce, à cet égard, les circonstances dans lesquelles Khater s'était présenté à son domicile où il était demeuré un certain temps et observe notamment que Danielle Abadie, qui aurait eu la possibilité de s'enfuir, se serait au contraire emparée d'un fusil après avoir malmené son visiteur et aurait fait feu sur celui-ci, prétendant sur la suite qu'il se serait suicidé."

119. *Infra*, Chapter 4. Compare the words of Cardozo, J, that a man "is under no duty to take to the fields and the highways, a fugitive from his own house." *People v Tomlins* (1914) 213 NY 240, 107 NE 496, quoted by Williams, Textbook, *supra* 520.

120. It is just possible that the court was influenced by the qualification to the liberty of non-retreat present in many doctrinal writings where the attacker was drunk (see *supra*). However the words of the lower court tend indeed to suggest that it was more concerned by the fact that no real intrusion under A 329 (1) had in fact occurred: "... car d'une part la riposte de Danielle Abadie n'a pas été immédiate à l'entrée de Christian Khater dans la maison et d'autre part il ne peut être soutenu que celui-ci, même en plaçant son pied dans l'entrebaillement de la porte, ait commis une escalade ou une effraction au sens (de l'article 329 (1) du Code pénal)."

121. L.74-91.383

122. See *infra*.

123. See *R v Bird* (1985) 81 CAR 110, *infra*.

124. Treatise, *supra*, pp.39-40.

125. Principles, *supra*, 1, pp. 100-101.

126. 1, 218.

127. *Id.*: "There is in such a case no sort of wrong or imputable blame on the part of the person assaulted, for which he should make amends by retreating: In duty to himself, he is rather called on, instantly, and without shrinking, to stand on his defence, that the assailant may not continue to have the advantage of him, but be straight way deterred from the prosecution of his felonious purpose."

128. *Ibid.* at 218.

129. Hume, 1, 223.

130. Hume, 1, p.217 ("... in the case of an occasional quarrel, the survivor must have given back, and done all that in him lay to take himself out of the affray...") 226, 227 and 229; Alison, 1, p. 101: "... he should

farther prove that he has fallen back as much as possible" (original emphasis); Burnett, p. 42; MacDonald, p. 106; Anderson, 148, who states later (pp.152-3) that it is culpable homicide to kill where there was an avenue of retreat available; likewise, Dunedin, *Encyclopædia, supra*, para. 275. Burnett further points out (p.42) that the retreat must be genuine flight, and not a tactical retreat in order to gain advantage in the affray: "... it being however understood, that the retreating was truly with a view to avoid killing, and not to gain a better opportunity of assailing his opponent." Cf. *R v Kessal* (1824) 1 C & P N.P. 437.

131. Hume, 1, 218.

132. *Criminal Law of Scotland, supra*, p.759.

133. (1954) JC 1.

134. *Id.* at 5.

135. *Criminal Law of Scotland, supra*, p.759.

136. Commentaries, 1, 229; c.f. Alison, 1, 103.

137. Gordon quotes Hume's words on the matter, apparently with approval. He does, however, go on to quote from the famous dictum of Edmund Davies, L.J. in *R v McInnes* (1971) 3 All ER 295, 300-301. There is some indication that Professor Gordon might prefer a similar view to be taken north of the border.

138. Compare the words of Burnett who states (p.42): "... the party must retreat, that is, retire as far as he can WITH SAFETY." (original emphases).

139. (1938) JC 60.

140. *Id.* at 62. See also *Robert McAnally* (1836) 1 Swin. 210, per L. MacKenzie (at trial) at p.217: "... it must be proved, that there was no other mode of escape."

141. See *Fenning v H.M.A.* (1985) SCCR 219, quoting (p.220) from Lord Mayfield at trial: "... the actings of the accused must be necessary, and if he has a means of escape from the attacker the plea of self-defence simply will not do." On appeal, the court was clearly at pains to qualify the right of self-defence by mentioning the need for there to have been no reasonable means of retreat - see p.225 at paragraph 3.

142. Foster commented that the writers had "not treated the subject of self-defence with due precision", remarking that they had "thrown some darkness and confusion upon this part of the law." - Crown Law 273.

143. PC, I 480.

144. Coke, *Institutes*, III 56; Hale, PC, I 479, 480, 481, 482; Hawkins, *Treatise*, I 75.

145. And see Hale 1 PC 482: "...it must be a flight from the danger, as far as the party can, either by reason of some wall, ditch, company, or as the fierceness of the assailant will permit."
146. *Discourse*, II, Ch. 3, p.277.
147. PC, I, Ch. 29, pp. 74-75. See also Stephen, *New Commentaries*, p.105: "The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or enormous bodily harm, and then in his defence he may kill his assailant instantly." See also *Digest* p.252.
148. Hale, PC, I 480, 482; Foster, *Discourse*, II, 277-8.
149. (1824) 1 Car. & P. N.P. 437. See also Stephen, *New Commentaries*, *supra*, p.104
150. Hale, PC, I 481; Coke, *Institutes*, III 56; Hawkins, *Treatise*, I 75.
151. Coke spoke of the risk of "danger of his life" and Hale applied it where "B cannot save his life if he gives back", while Hawkins allowed it where "he cannot go back without manifestly endangering his life".
152. PC, I 481.
153. *Institutes*, III 56.
154. There was in fact a third - the privilege to stand one's ground also applied to officers of the law acting in the execution of the law. Coke, *Institutes* III 56; Hale, PC I 480-1;
155. *Treatise*, I 69-73, and 73-76. The author further separated justifiable homicide into that which was of a public nature, involving officers of the law, and private justifiable homicide, which is of greater concern here.
156. *Crown Law*, p.273 et seq.
157. *Treatise*, p.71.
158. Arising out of his expression "As if a thiefe offer to rob or murder B ..." (*Institutes*, III, p56). The question was whether this presented two situations of private defence (murder and robbery) or, suprisingly enough, just one (murder as an 'alternative' implied threat to back up an attempted robbery).
159. PC, I 271.
160. See *infra* Chapter 4.
161. (1940-42) 28 CAR 65.

162. Ibid. at 71: "... nor did the Judge make any observations on the question whether Mancini could not have escaped from the threatened danger by retreating from the club."
163. (1969) 2 All ER 856.
164. Cp. though, Stephen, *General View*, *supra*, 122.
165. (1969) 2 All ER 856, 858.
166. (1971) 3 All ER 295.
167. "The direction was given in these terms: 'In our law if two men fight and one of them after a while endeavours to avoid any further struggle and retreats as far as he can, and then when he can go no further turns and kills his assailant to avoid being killed himself, that homicide is excusable, but notice that to show that homicide arising from a fight was committed in self-defence it must be shown that the party killing had retreated as far as he could, or as far as the fierceness of the assault would permit him.' One does not have to seek far for the source of this direction. It was clearly quoted from Archbold, which is in turn based on a passage in Hale's *Pleas of the Crown*." (1971) 3 All ER 295, per Edmund Davies, LJ (djc) at 300.
168. (1971) 3 All ER 295, per Edmund Davies, LJ (djc) at 300.
169. *Id.*
170. *Id.*
171. (1975) CLJ 282, 286.
172. (1971) 3 All ER 295, 301: "It is submitted by the defence that the defendant had manifested an unwillingness to fight, but in our judgement the evidence is strongly to the opposite effect."
173. See e.g. *R v Gilbert* (1978) 66 CAR 237; *Priestnall v Cornish* (1979) Crim.L.R. 310, though in the latter case it is clear that "post-necessity" was the main focus of the judgement.
174. (1972) Crim. L.R. 435.
175. Forbes, J.
176. (1985) 81 CAR 110.
177. (1985) 81 CAR 110, cited at 112.
178. *Id.* at 114.
179. *Id.*
180. (1971) 1 All ER 1077, *supra*.
181. (1980) 71 CAR 192, *supra*.

182. The Court quoted from McInnes, which also had approved the view of Professors Smith and Hogan (in the earlier 2nd edition, 1969 p.231) that the failure to retreat was "simply a factor" in the overall calculation. "Had the judgement stopped there" said Lane, CJ in Debbie Bird, "there would have been no difficulty. But it continues by citing the passage from the judgement in Julien which we have already read." i.e. re the duty to temporise etc.. Hence, the Court in Debbie Bird criticised the judgement in McInnes for having put the additional gloss of the duty to temporise on top of its statement that failure to retreat was just one factor. Ashworth on the other hand had found fault with the same judgement for having put the gloss the other way round, and he would have preferred the straightforward duty to temporise etc. to be retained.
183. Smith & Hogan, *Criminal Law*, supra, p.327, quoted by Lane, L.C-J. (djc) in Debbie Bird (1985) 81 CAR 110, 114.
184. See *infra*, Chapter 3.
185. Ashworth, too, regrets any lack of certainty in this area of the law, though for entirely the opposite reason. He prefaces his remarks regarding retreat, by pointing out that the approach he favours ("the method of legal principles") is preferable to the strict "rule and exception approach" and more certain than what he calls the "open texture" approach, which is so vague as to give no real guidance. Yet, looking at his words, one sees little difference between the strictness of the second of these approaches, and the legal principle that he favours. At page 293 of his article ((1975) CLJ 282), he cites with approval the principle that "a Person Threatened with Attack Ought to Avoid Conflict if Reasonably Possible, and that a Person Under Attack Ought to Withdraw if Reasonably Possible." The author then goes on to explain: "The words 'if reasonably possible' indicate that in some types of cases the duty cannot apply. Thus, when an individual apprehends an attack, and withdrawal or other avoidance-methods are not reasonably practicable, he ought to be permitted to strike first in an endeavour to prevent imminent and serious harm to himself." But such a statement immediately invites two major objections. Firstly, it tells us nothing new - Carmen Deana (1909) 2 CAR 75, Chisam (1963) 47 CAR 130 and Devlin v Armstrong (1971) NI 13 all indicated the right to a pre-emptive strike. But secondly, the principle amounts to a simple tautology. It essentially declares that one must retreat if one can, but if one cannot, then one is under no such duty; all of which, furthermore, amounts to a straightforward duty to retreat.
186. See e.g. the words of the lower court, cited in Cr 31 janvier 1978 L. 76-93.327 (Spataro); also Fenning v H.M.A. (1985) SCCR 219, per Lord Cameron at 225.
187. Robert McAnally (1836) 1 Swin. 210, per L. MacKenzie at 218.
188. (1980) 71 CAR 192; (1980) Crim.L.R. 438
189. (1980) 71 CAR 192, per Ormrod, L.J. (djc) at 196.
190. Palmer v Reginam (1971) 1 All E.R. 1077, per Lord Morris of Borth-y-Gest (d.j.c.) at 1088; R v Morse (1910) 4 CAR 50, per Darling, J at 51;

R v Jackson (1985) RTR 257, per recorder quoted at 262; R v Shannon (1980) 71 CAR 192, per Ormrod, LJ (djc) at 196; Serpillon, *supra*, Tit. XVI, Art 2. no. 18 p. 757: *...attaqués...si vivement, que vraisemblablement nous ne pourrions nous en garantir autrement*"; Stephen, Digest, *supra*, 251-2; R v Wheeler (1967) 1 VLR 1531, per Winn, L.J. at 1534. Reed v Wastie Times February 9 1972 (where the court declared that in the circumstances one did not use "jewellers' scales" to measure reasonable force). See also the words of Lord Moncrieff in charging the jury in John Forrest (1837) 1 Swin. 404, 418: "It may be thought, that it would have been better if he had not taken the pistol at all. But can any of us tell, that this would have been our own conduct in such agitating circumstances?"

191. Reference under s.48 A of the Criminal Appeal (Northern Ireland) Act 1968 (No. 1 of 1975) (1976) 2 All ER 937, 947.

192. Brown v U.S. (1921) 65 Law Ed. 961, 963.

193. See eg Fenning v H.M.A. (1985) SCCR 219, per trial judge (Lord Mayfield), quoted at 222.

194. See e.g. Hume, 1 335: "It is also to be understood, that in deciding on pleas of this sort, the Judge will not insist on an exact proportion on injury and retaliation, but rather be disposed to sustain the defence, unless the pannel has been transported to acts of cruelty or great excess. This is the just and proper rule: because allowance must be had of the heat of blood on such occasions, when there is no time for reflection; and because the retaliation is intended to deter the assailant..."; MacDonald, *supra*, 116.

Note that Hume is incorrect in his assertion that the purpose is also "to punish him for the violence he has already done; and this effect it can only have, if it bear evidence of resentment as well as resolution." Private defence is not based upon the notion of punishment. However, perhaps Hume would reply that his point is that in cases of assault, it is not strictly a plea of private defence that is sustained, but a combination of self-protection and private punishment. Cp. Stephen, *General View*, 122: "...self-defence against a slight assault must, if justifiable at all, be confined within the narrowest limits - that is, it must be confined to what is reasonably necessary to avoid personal injury or to stop, not to punish, the grossest personal insult."

195. (1975) SLT (n) 84

196. *Id.* at 85.

197. (1937) JC 53. For the facts of the case, see *supra* Chapter 1.

198. *Id.* at 58.

199. *Id.* at 58.

200. Crawford v H.M.A. (1950) JC 67, per Lord J.-G. Cooper at 70, and Lord Keith at 71. See also *supra*, Chapter 1.

201. Connorton v Annan (1981) SCCR 307.

202. Carman Deana (1909) 2 CAR 75.
203. (1938) JC 60 per Lord Jamieson at 62: "...The second point that you must be satisfied on is that the means he took to overcome the assaults were necessary - in short, that what he did was necessary to save his own life."
204. (1954) JC 1.
205. Id. per Lord Keith at 4-5.
206. Id. at 4-5. Again, there was no reference to "cruel" or "gross" excess.
207. (1985) SCCR 219.
208. See the words of Lord Mayfield, cited id. at 220.
209. I.e. the stress was that cruel excess would defeat the plea, not that the plea would hold good so long as there was no cruel excess. Thus: "...And lastly, ladies and gentlemen, there must be no cruel excess of violence on the accused's part. If he goes further than is necessary for his defence and uses cruel excess that cannot in law constitute self-defence." (the trial judge, Lord Mayfield, quoted at 220); "While the law permits the use of force in repelling force....the protection which the law affords to the victim of an attack is not a licence to use force grossly in excess of that necessary to defend himself" and "It is however clearly the duty of the judge to explain to the jury that the benefit of the defence is lost where the force used to repel the attack is excessive..." (per Lord Cameron, at 225.)
210. See Commentaries, i 227: "One is suddenly invaded and beaten with a club, bludgeon or other the like dangerous implement, by a person of superior strength, and in a chamber from which he cannot immediately escape; and in this alarm, to save his life, he draws his sword and kills. It is proved, however, that there was help at hand if he had called for it, or that there was a staff, poker, or the like, in the room by him, or that by cool and skilful management of his sword, he might at last have made good his retreat, without sacrificing the aggressor's life. That he has done otherwise, may, and with the aid of circumstances in evidence, will be presumed, to have been owing, not to a revengeful or malignant temper, but to the alarm and trepidation so natural on such an occasion. But though this disorder of spirits be sustained as an excuse; still there is a precipitancy, which is in some measure a blemish in his conduct, and deprives him of the benefit of an absolute and entire justification." (original emphasis) The finding of a 'blemish' in the conduct, and the reference to "cool and skilful management" of one's weapon are all the more puzzling, and regrettable, given the author's clear recognition of the alarm and panic which such an attack may induce. See Connorton v Annan (1981) SCCR 307. Although the words of the sheriff in Hillan v H.M.A. (1937) JC 53 were disavowed by the High Court as having been too strict, the general tenor of judicial statements suggests that the underlying attitude towards defensive force which they expressed still colours much judicial thinking.
211. (1980) 71 CAR 192; (1980) Crim.L.R. 438, *supra*.

212. B.C. no. 474; D.1962.J.226
213. See e.g. Cr 18 octobre 1983 (T...) L.83-90.831
214. See also I.C. Ambert 5 juin 1956 (Malcurat et Convert) GP 5-7 septembre 1956. The court did not hide its opinion of those who stood by and did not intervene: "Attendu que Batisse Marcel ... n'a cependant pas d'autre moyen à sa disposition que de continuer à tirer, ne pouvant escompter aucune aide d'un entourage masculin lâche et terrorisé par Convert...."
215. L.83-90.825
216. A weapon which is implicated in shootings, both fatal and non-fatal, with astonishing regularity in France. The far more liberal firearms legislation which prevails in France is in no small way responsible for the character which many acts of alleged private defence may assume, for recourse to such weapons is beyond doubt far more frequent than in Britain.
217. B.C. no. 362
218. See also the astonishing decision of the *Cour d'appel de Rouen* which formed the basis of the *pourvoi* in Cr 28 juillet 1975 (Leblanc) G.P.1975.2.713. For the facts of the case, see *supra*, Chapter 1. Fortunately, the decision was overturned by the *Cour de cassation*.
219. E.g. Cr 16 décembre 1970 (Halle, Denise) L.69-92.294; Cr 28 juillet 1975 (Leblanc).
220. Stéfani, Levasseur et Bouloc, *Procédure pénale*, *supra*, pp538, 712. C.f. eg Cr 27 mars 1818 B.C. no.36 (Rosay); Cr 8 janvier 1819 S.1819.1.3, B.C. no.3 (Cazelles); Cr 2 octobre 1979 L.79-90.148 (Benghenissa); Cr 14 janvier 1976 L.74-91.383 (Fatier); Cr 20 juillet 1976 L.76-90.626 (Fontaine). Nevertheless, as was pointed out to the writer by several academics and law officers, the application of this practice will vary according to social and historical circumstances, in any given period.
221. For further details of the pre-trial procedures in France, see Sheehan, A.V., *Criminal Procedure in Scotland and France - A Comparative Study, with Particular Emphasis on the Role of the Public Prosecutor*, Edinburgh 1975, and Stéfani, Levasseur et Bouloc, *Procédure Pénale*, *supra*, especially pp529-741.
222. Tribunal Civil de Strasbourg 10 mars 1953 (Dame Tronchère c Andrés) 10 mars 1953; JCP.1953.II.7855 note Alexandre.
223. Cour d'appel de Dijon 8 janvier 1965 G.P.1965.I.155 (Arcelin et Jacquin).
224. Cr 5 juin 1984 (Muller) B.C. no. 209
225. Cour d'appel de Nancy 9 mars 1979 (Bastien) GP.1979.655. note P-L.G.; D.1981.J.462.
226. *Infra*, Chapter 4.

227. J.C.P. 1983.II.19958. And see J.C.P. 1978.II.18869 & 18903 bis. (Note Bouzat).
228. E.g. Nancy 9 mars 1979 (Bastien) GP.1979.655; Cr 28 juillet 1975 (Leblanc), GP.1975.2.713 & L.75-90.256; Cr 31 mai 1972 (Agostini) B.C. no. 184; Cour d'appel de Dijon 8 janvier 1965 G.P.1965.I.155 (Arcelin et Jacquin).; Cour d'assises de la Seine 20 octobre 1960 (Vve. Gardet c Mayoux) GP.1961.I.186
229. See e.g. Muyart de Vouglans, *Institutes supra*, Pt.1, Ch.1 pp.9-10; Rousseaud de la Combe, *supra*, Pt. 1, Ch2, 7.3, p.83; Chauveau et Hélie, *supra* 183; contra Jousse, *Traité, supra*, Pt. IV, Tit.XXI, Art.VI, no.72, pp.510-11; Pufendorf, *supra*, Bk. II, Ch.V, SIX, p.296. Alison states (i, 176) that "words will not justify blows, nor blows with the fist the use of a lethal weapon". He is speaking here of the case of a charge of assault against an accused. In his earlier discussion of homicide, his writings do reveal a restrictive approach to the use of deadly weapons (see e.g. i, 20, 21). However, at pp. 103-4, his reasoning, based on Hume (i, 230) betrays the confusion there is between parity of weapons as a rule of substance, and as an evidential factor. Burnett (p.46) appears to be less strict, saying the plea may be excluded in certain cases where there is no parity and * where the weapon is used "in a way which betrays symptoms of a cool and deliberate purpose and a thirst of blood; - as if one, openly attacked by blows with the fist, should, during the affray, draw secretly from his pocket a knife, or other instrument, and mortally wound his adversary." (original emphasis) * The annotation in the margin, however, uses the word "or", thus giving an entirely different meaning.
230. A threat to which the court specifically adverted in the case of Bastien, Nancy 9 mars 1979 GP.1979.655; see also the facts of Tribunal civil de Strasbourg 10 mars 1953 JCP.1953.2.7855, note Alexandre (Dame Tronchère c André).
231. Mancini v D.P.P. (1940-42) 28 CAR 65, per Viscount Simon at 71: "Self-defence by the use of so deadly a weapon (seven-inch long knife) could not be made out if Mancini was never threatened with the pen-knife...". In H.M.A. v Doherty (1954) JC 1 Lord Keith (at 5) charged the jury that: "...if a man was struck a blow by another man with the fist, that could not justify retaliation by the use of a knife, because there is no real proportion at all between a blow with a fist and retaliation by a knife." Insofar as Lord Keith confined his remarks to the case of a single punch then this will generally be true; see for example Cr 20 mai 1980 (B...) L.79-93.403. See also Kenny, *Outlines of Criminal Law* 19th ed. (Turner, J.W.C., ed.) Cambridge, 1966 207, citing Osborn v Veitch (1858) 1 F & F 317. But even in such a case this will not always be so. Consider a person with an 'egg-shell' skull. One blow to the head may produce very serious injuries, if not death. In such instances, recourse to deadly force would surely be justifiable, if reasonably necessary.
232. As Professor Williams rightly points out (*Textbook* 506): "The real-life problem arises where a person is fiercely attacked by a bully whom he can resist only by the use of a lethal weapon. It is now so common for brutal men to kick their opponent about the head after he has been

fell to the ground that anyone who is attacked may reasonably dread this possibility."

233. E.g. *R v Weston* (1879) 15 Cox 540; *R v Morse* (1910) 4 CAR 50; *R v Sharp and Johnson* (1957) 1 All ER 577; *Bullard v R* (1957) AC 635; *John Forrest* (1837) 1 Swin. 404. It is possible, though to see the Scottish case as either an application of the principle of dwelling defence (*infra*, Chapter 4), or an illustration of the concession made by Alison (1, 103-4) and Hume (1, 230), which in essence betrays their misunderstanding of the issue of parity of arms.
234. *Criminal Law of Scotland*, *supra*, p760.
235. *Supra*, 179; see also Priolaud *supra* 92 and Sieurac, *supra*, 72, who also point out that what is important is the use which is made of the weapon. Alison, (1, 93) cites the case of James McGhie 17th January 1791, and says of it that the homicide committed would have been justifiable "if done with the fist or the stick, but the use of a lethal weapon, after the deceased had been thrown on the ground, and the plea of defence of his father was at an end, rendered it culpable in a high degree." However, it is clear from these very words that not only is there confusion as to parity of arms as a standard and a test; in any event the case is not even in point, for what was clearly at issue is "post-necessity" since the attack was evidently over.
236. L.79-93.246.
237. A had found himself replaced by one C as the object of the affections of X, a woman who owned a bar. A went to the bar in order to have it out with C, but he did so having first armed himself with a loaded shotgun and cartridge belt. He entered the premises, and after discreetly observing the situation from a darkened corner, identified C, whom he did not previously know. He went up to the counter and 'invited' him to go outside with him, whereupon C swung round holding a pistol which he had surreptitiously taken hold of, and fired six shots at A, who, letting go of his weapon, fell to the ground, hit in the stomach. Nonetheless, he managed to recover the shotgun and shot C once in the chest. He then somehow got up, and, bending over C who was lying immobile on the ground, and fired a second shot into the back of his neck. From the resulting wounds - both of which were judged by forensic experts to have been fatal - C died an hour and a quarter later.

Somewhat surprisingly, one might think, the investigating magistrate pronounced an *ordonnance de non-lieu* in relation to the first shot, finding sufficient evidence of self-defence. He did, however, send him for trial in respect of the second wounding, which, it was felt, was not justified. The *ministère public* appealed this on the grounds that he should have been committed for trial before the *Cour d'assises*, which appeal was successful, and upheld by the *Cour de cassation*. Leaving aside these procedural matters, it is difficult to understand how the various authorities could have decided the case in this way. From the circumstances narrated, it is hard to see how private defence ever came to be a live issue in respect of A. If anyone acted in self-defence that evening, it is submitted that it was the deceased. The failure to recognise this does itself suggest a somewhat over-objective

interpretation of the circumstances of the initial confrontation between A and C.

238. E.g. *R v Jackson* (1985) RTR 257, per Park, J (d.j.c.) citing the words of the recorder, at 262: "... What (the accused) is allowed to do is what is reasonably necessary in the circumstances in which he finds himself."
239. Professors Smith and Hogan (*supra*, 326) appear to accept the standard laid down by Lord Diplock.
240. *Traité, supra*, Pt. IV, Tit.XXI, Art.VI, no.72 pp. 511-12. See also Delmas-St. Hilaire, J-P., *Jurisclasser, supra* no. 141, citing Garraud.
241. L.83-91.144
242. *Id.*
243. L.76-92.457
244. See also Cr 21 janvier 1975 L.74-91.856 (Kaliszuk).
245. (1957) 1 All ER 577; (1957) Crim.L.R. 242.
246. See also e.g. *Palmer supra*, per Lord Morris at 1088: "It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide." One may hope that his Lordship had in mind, *inter alia*, just such circumstances as those presently discussed.
247. (1937) JC 53; see especially Lord MacKay at 61-2.
248. See e.g. *John Forrest* (1837) 1 Swin. 404, per L. Moncrieff at 418.
249. Cr 4 décembre 1973 (Kordasiewicz) L.73-90.453; Cr 20 novembre 1956 (Driot) B.C. no. 761; Cr 14 avril 1955 (Gnaedig) B.C. no. 299; see also *R v O'Neill* (1967) 51 CAR 241. The Court of Appeal referred to the appellant as "a young man and a skilled boxer", who, according to the trial judge "did know his own strength". In varying his sentence for manslaughter (to which he had pleaded guilty) the the Court curiously stated "... although it may be that technically this man could not rely on the defence of self-defence, yet to all intents and purposes he was a man who was in fear of being set upon, if not being actually set upon, by Hands and his friends." Though it is not precisely clear to the writer what was meant by these words, the judgement does seem to suggest that the particular physical skills of the appellant influenced the court somewhat in its comments.
250. *Self-defence and the Right to Life* (1975) CLJ 282, 299; also, Lepointe, E. *Le diagnostic judiciaire des faits justificatifs* 1969 RSC 547, 560-1.
251. (1971) 1 All ER 1077, 1088.
252. *Ibid.* 561; c.f. the comment to *R v McInnes* (1971) Crim. L.R. 651, 653.

253. B.g. Aussel, J.-M. *La Contrainte et la Nécessité en Droit Pénal* in *Quelques Aspects de l'Autonomie du Droit Pénal* (Stéfani, G., éd.) Paris, 1956 253, at 257: "Le droit pénal ne prend plus alors en considération la mentalité du délinquant, mais une situation objective qui rend l'acte conforme au droit. C'est l'acte lui-même qui n'est plus délictueux, toute considération subjective étant écartée." Aussel's analysis is however largely accurate from a purely theoretical point of view. In one important way, the case of *R v Dadson* (1850) 3 Cart & K 148 demonstrates the view held by some that subjective considerations do, even on point of principle, enter into the arena.
254. (1971) 1 All BR 1077; (1971) 55 CAR 223; (1971) Crim.L.R. 649.
255. (1971) 1 All BR 1077, 1088.
256. (1980) 71 CAR 192.
257. *Id.* at 195-6.
258. *Id.* at 197.
259. *Criminal Law of Scotland*, *supra*, 750: "... the term "self-defence" ... is used both to describe a fact and to make a legal judgement. "He acted in self-defence" may mean only "He acted for the purpose of defending himself," or it may mean "He acted for the purpose of defending himself and was justified in doing so, having regard to all the circumstances." Whether any situation is one of self-defence in the first meaning is a question of fact; whether any situation is one of self-defence in the second meaning involves questions of law, and depends on the rules regarding self-defence in the legal system in the context of which the statement is made." See also Professor Couvrat's apposite comment (*La notion de légitime défense dans le nouveau droit pénal*, VIe Congrès de l'Association Française de Droit Pénal, Faculté de droit et des sciences économiques de Montpellier, 7,8 et 9 novembre 1983): "La légitime défense sert souvent de prétexte, elle n'est pas toujours pour autant une justification."
260. See also Gèze, *supra*, p.84, "Pour apprécier d'une façon exacte, dans les cas particuliers, les conditions de la légitime défense, il faut donc se placer au point de vue subjectif: 'Il faut entrer pour ainsi dire dans la conscience de l'attaqué pour évaluer le danger de la manière dont il s'est présenté à lui et rechercher le moment où la nécessité de la défense est née et a cessé ensuite dans son esprit.'" (The quotation is taken from Alimena, *I limiti e i modificatori dell' imputabilità*, Torino, Bocca, 1899 Vol. 3, p. 61). Again, at p. 92: "la légitime défense ... finit quand le danger a disparu dans l'esprit même de la personne attaquée, par suite elle peut durer quelque temps après que le mal a cessé." (original emphasis). See also p. 98.
261. (1980) 71 CAR 192, 197.
262. See for example the passage in Chauveau et Hélie, *supra*, p. 186 cited with approval by Le Sellyer, *supra*, p. 263. Note that the commentator to *Palmer* does remark of Lord Morris's words on "most potent evidence": "If juries are directed in these terms, it will rarely if ever happen

that a jury will find that a person acting in good faith used excessive force." 1971 Crim L.R. 649, 650.

263. (1984) 78 CAR 276. See *supra*, Chapter 1.

264. (1984) 1 All ER 988.

265. Lord Chief-Justice Lane and Lord McCowan.

CHAPTER 3

THE DEFENCE - QUALITATIVE ASPECTS

1. The Qualitative Factor - Proportion

While necessity is clearly an essential component of the plea of private defence, it cannot alone suffice to describe its foundation. Based solely on a necessity requirement, the law of private defence would permit one to inflict serious injury or even kill, were it the only way of averting an attack of a relatively mild nature. This is best illustrated by an extreme example, such as where a young girl is accosted by an unwelcome but harmless admirer who is intent on kissing her, and whose strength is such that she cannot prevent this other than by stabbing him with the metal comb she has in her bag. ' Such action is clearly necessary to prevent the intrusion, but the question is whether it is permissible in law to do so, and there is no doubt that in all three jurisdictions such behaviour is not allowed. Stepping in, therefore, to complement the necessity requirement is that of *proportion* or *proportionality*, which both highlights and recognises the fact that the term "attack" encompasses a whole spectrum of affronts to one's person, ranging from homicidal assaults at one end, to the most trifling nuisance at the other.

This dual character of the basic requirements of private defence was described by the Criminal Code Bill Commission of 1879:

"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent." ²

(emphasis added)

The two notions are thus conceptually separate in nature. The first is factual - could the result reasonably have been achieved using less force ? The other, proportion, is more evaluative, reflecting social perceptions as to what is or is not permissible in a society governed by law - is the endangered interest one which one should lawfully be able to protect by the use of serious force ? ³ Nevertheless, they are easily confused, and indeed the Commission's curious use of the word "necessary" to explain both concepts in the first half of the above passage does little to prevent such confusion. ⁴

One or two cases in England and elsewhere do show the judiciary expressing themselves solely in terms of necessity, ⁵ but there is little doubt that they did not imply support for the rule of autonomy - that whatever the circumstances, physically necessary force is the sole criterion - and it is clear that autonomy has never as such dominated the law of private defence.

In France, the term proportion was nowhere stated in either of Articles 328 and 329 of the *Code pénal*, ⁶ and it was therefore left to the judiciary to develop the principle - from the basis of the text. Not surprisingly, they did so by deducing it from the concept of "nécessité", as found in both provisions, in much the same manner as the Criminal Code Bill Commission. But it will be seen that this is to use the concept in a figurative manner, which distorts the conceptual separation between the factual and the evaluative, importing the normative into what is essentially descriptive - an approach typified by Garçon, among others. ⁷

Regrettably, this is not the only confusion. For some authorities, particularly in France, in effect do the opposite. Thus, one finds that where force which is unnecessary (i.e. factual issue) is used, the court will often describe it as "*disproportionnée*", hence using a term which is usually known as conveying a normative sense, yet clearly used here in a factual sense - one might perhaps speak of "*proportionate prevention*" to describe this (mis)use of the concept. ⁸ The result is that often the only certainty in a case is that the force used was either approved of or disapproved of by the court in question, it being impossible to determine in what particular way they found the violence to have breached the requirements of lawful

defensive force. Examples of this ambiguity, which in various forms is also firmly evident throughout academic writings on the subject, * are far too numerous to cite individually, but a classic illustration of this obscurity in legal reasoning is to be found in the Devaud case, which we examined above, and which demonstrates that the confusion has emanated from the very highest of judicial authorities. It will be remembered that Devaud failed in his plea of self-defence for his use of a bottle against an unarmed opponent. In upholding this, the *Cour de cassation* stated:

"Attendu que pour écarter la légitime défense ... l'arrêt attaqué énonce '(qu')il n'était pas nécessaire pour lui de répliquer par un violent coup de bouteille...; que cette défense n'était pas nécessaire';

Attendu que dans les circonstances souverainement constatées par l'arrêt, la Cour a pu estimer ... la défense de Devaud en disproportion avec l'aggression dont il était l'objet, et ne point reconnaître et admettre le péril actuel commandant la nécessité de la blessure faite; " 10

(emphasis added)

In the case of Pesleux 11 the confusion is even more apparent. As we saw in the previous chapter, the lower court had found no need whatsoever for defensive action, as there was nothing to suggest that an attack of any sort was imminent. Yet, in confirming this judgement, and indeed citing the lower court's reasons, the *Cour de cassation* declared, curiously, that "*les juges du fond ont pu estimer que la défense de Pesleux était en disproportion avec l'attaque dont il était l'objet*", thus radically distorting the sense of the lower court's decision. It is difficult to see how proportion could enter into it when there was no attack in the first place, and hence no question of private defence. 12

Preliminaries

Before examining the implications and consequences of this confusion, several points require to be made. Firstly, it is submitted that when we speak of "proportionate", we mean proportionate to the harm threatened, not

the violence used. At first sight, the distinction may well seem pedantic, but a moment's consideration demonstrates this not to be so. Imagine the case where X is about to inflict a blow upon Y. To prevent this Y stabs him, fatally as it turns out. One might possibly judge this somewhat excessive; but, it so happens that Y has an 'egg-shell skull'. Now, while his attacker may clearly only intend light violence, the consequences of any blows struck could prove disastrous for Y, and therefore Y's violence is surely justified. If so - and various authorities seem to bear this out ¹³ - it would constitute an ironic turn to the principle that "the attacker takes his victim as he finds him."

More importantly, if one accepts that the test is not simply harm threatened, nor even harm reasonably anticipated, but harm reasonably to be anticipated by an individual in the position and circumstances of the accused, then one may see that the principle should, arguably, extend to the elderly, the very young, and those others, such as young women, whose physical characteristics justify a fear of disproportionately harmful injury from any given use of force. Furthermore, it is vitally important to recognise the great difficulty in many situations of gauging the precise intentions of an attacker. True, the use of a weapon may well indicate deadly danger, but as La Fond pointedly remarks, there is not *"any necessary logical correlation between what harm an aggressor intends to inflict and the force he has at his disposal"* ¹⁴ and it is submitted that the absence of patently deadly force (such as the use of a weapon) should not be introduced as a *"matter of prejudice"* ¹⁵ against an accused, but rather, should be viewed as an evidential factor in determining what the victim reasonably feared. ¹⁷

Finally, it is essential to a proper understanding of private defence that the proportion is seen as being between the evil threatened by the attack, and the means used in defence, *not the harm inflicted by the defence*. Again, the distinction may seem academic, but it is by no means so, and the failure by the triers of fact to recognise that the two do not always go hand in hand may well have dire consequences for an accused. A defender should not be liable for the unintended and unforeseeable consequences of his or her riposte, if the actual strength of the reply did not go beyond the bounds of either necessity or proportion.

Clearly, there is a formidable hurdle for the accused in such a case, but the jury, or other triers of fact, should not lose sight of the principle. Subject, therefore, to the points made in the preceding two paragraphs the writer wholeheartedly endorses Professor Gordon's observation that "... the important question is not whether the death of B was justifiable, but whether A's assault itself was justifiable. What is measured is not B's death against A's danger, but the violence used by A against the violence threatened by B." ¹⁹ In short, it is the act itself, not as such the consequences, which is important. As we shall see later, it is precisely the failure to recognise this distinction that has led the French courts, particularly since 1967, into some of the greatest confusion regarding the law of private defence, much to the detriment of some accused.

Indeed a quite fundamental aspect of private defence, and one regrettably all too easy to forget, is that so much depends on simple fortune - good or bad. In situations where conflict may often evolve rapidly, with little time for "detached reflection" as to the direction, timing or weight of one's blows, the difference between a murder charge and one of wounding may literally be expressed in terms of centimetres, and in the event of serious injury it is undoubtedly an exceedingly difficult task for any trier of fact to avoid the automatic assumption that the injury was caused by inherently deadly or otherwise serious force, commensurate with the injuries sustained. One cannot help wondering how Debbie Bird would have fared had she lashed out a few inches lower, and inflicted a fatal neck wound upon her attacker. ¹⁹

It would, though, be easy to make too much of proportion - not least for the difficulty there will be in gauging the intentions of an attacker - and the rule arguably occupies a somewhat restricted (or at least low profile) rôle in the law of private defence - one might best describe it as a reserve rôle. ²⁰ It is submitted that there are two main reasons for this.

Firstly, in those cases where a plea of private defence is rejected, it will most likely have been so decided because the force used breached the necessity test - in other words, even taking account of the heat of the moment, the violence went substantially beyond that sufficient for an

effective defence. Thus, the evaluative issue is never really addressed, and remains in the background. The riposte may well have been disproportionate, but the prior question of necessity will have disposed of the matter in the minds of the triers of fact.

Secondly, therefore, one must appreciate that necessity and proportion will often be in consonance with each other. In the case of a relatively mild assault one could hardly expect to succeed in a plea private defence against a charge of murder; not just because of the manifest disproportion, but also because more likely than not, such force would have been quite unnecessary as a means of preventing the intrusion.

It will in fact be in relatively rare cases that they run out of step. But where this does happen, necessity will be satisfied, and therefore the whole issue will turn on proportion, left conspicuously out on its own. But when can this arise? Cases of such as that of the vulnerable girl above are doubtless plausible, but hardly the stuff of law reports. But there is one area where necessity and proportion can be prised apart, as it were. This is in the field of the defence of property. The subject merits fuller discussion later in this study ²¹ but requires mention here.

In effect, those cases where private defence is exercised "at arm's length" demonstrate the principle. Where an apple raider makes off in the distance with fruit from one's orchard, there can be little doubt that the use of a firearm against him satisfies the necessity requirement - it is really a case of "all or nothing" regarding the violence used. Clearly, then, whether or not such force would be justified must then turn solely upon the evaluative issue of proportion, which stands out clearly on its own.

It comes as no surprise, then, that one of the few cases to illustrate so clearly the operation of proportion concerns the 'arm's length' defence of property. In Taylor v Mucklow ²² the facts were that the appellant had refused to pay the full amount for work already done on an upper-floor extension being built to his house. The builder in question thereupon threatened to demolish work to the value of the amount in dispute, and proceeded to take a sledge-hammer to the extension. The accused took out a loaded airgun and, claiming it to be a .22 rifle, aimed it from the road

below at the builder's knee-caps. He was convicted of an offence under the Firearms Act 1968, and his appeal was rejected. It seems from the facts that the use or threat of use of a firearm was necessary in the circumstances, and therefore it follows that the decision on proportion decided the case. This is supported by the reasoning of the Court of Appeal, which declared, according to the report, that *"For anyone to argue nowadays that a loaded firearm was a suitable way of restraining the kind of bad temper exhibited by the builder was to show a lack of appreciation of modern trends and dangers."* ²³.

2. Private Defence and the Principle of Reasonableness

We may now return to our earlier analysis of private defence. In England at least, the habit of the judiciary has, in fact, not been to present private defence as a twin test. Instead, the plea is frequently described according to one simple yardstick - that of reasonableness. The practice is by no means novel, for as far back as 1706 Holt, C.J. was telling us *"that for every assault he did not think it reasonable a man should be banged with a cudgel"*. ²⁴ In his suggested model direction to a jury, Lord Edmund Davies included the instruction that *"A person who acts reasonably in his self-defence commits no unlawful act"* ²⁵ and caselaw shows that the notion has now established a stable niche in the law of private defence. ²⁶ In Scotland, too, the concept has arisen in the reports, ²⁷ although the tendency of the courts there to view private defence as a variant of necessity, the resulting strictness of the judicial interpretation of the plea, and the scarcity of cases no doubt go some way to explaining why reasonableness is not traditionally viewed as a distinguishing characteristic of Scots law.

There is little doubt that the passing of the Criminal Law Act 1967, section 3(1) of which justifies the use of *"such force as is reasonable in the circumstances in the prevention of crime"*, has consolidated the impact of this trend. So much so, in fact, that some authorities argue that the rules - if not the very pleas - of private defence and prevention of crime are now indistinct, ²⁸ (though this view has been convincingly criticised ²⁹ and is furthermore confounded by judicial statements ever since the Act came

into force ³⁰). Sharply representative of this less formalistic view of the requirements of private defence are, it is submitted, the several judicial affirmations over the course of the years to the effect that there is no need for a set direction to a jury on self-defence ³¹ - indeed, by 1973, some judges had come to regard the notion as veritable anathema. ³²

Critique

The use of such a standard of reasonableness, for any jurisdiction which applies it, is eminently understandable. The unified criterion arguably saves the trier of fact from entering into what some would consider an unnecessarily complex twin investigation of issues. He or she would decide one issue instead of two. It also takes account of the fact that situations of private defence can appear under many different guises, with a multitude of variations from case to case. As Lord Morris in Palmer stated:

"... An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death has resulted." ³³

However, it must surely be questioned whether the single test of reasonableness is in reality a desirable formula. For it suffers from the characteristic common to many 'catch-all' formulae, namely the departure from any degree of precision which might assist in predicting the outcome of a particular case. Certainly, one might argue, the criterion allows one to be judged by one's peers according to community standards of what is acceptable in a given period - but this immediately begs the question. Is it necessarily desirable that one should be exposed to "the vagaries not only of juries but ... also of judges, and ... gusts of public opinion" ³⁴ ? In this respect, then, reasonableness emerges as a decidedly double-edged implement. At the root of the debate lies one simple question: is reasonableness a question of fact or a question of law ? The essential difficulty has resulted from the notion that reasonableness is a matter for

the jury. The authorities, certainly in England, are overwhelmingly in favour of reasonableness being a question of fact. ³⁵

In one major respect of course, the question is always one of fact. So far as the necessity component is concerned, the decision - a factual one - is properly one for the jury (or magistrates). But it is argued here, one will recall, that the twin requirements of necessity and proportion have largely been collapsed into one. It is the failure, then, to distinguish between necessity on the one hand, and the evaluative concept of proportion on the other - both of which are often subsumed by the term "reasonable" - that has left a serious void in the law. For if one says that reasonableness is always a question for the jury, then the implication is that both the question of necessity (factual) and that of proportion (evaluative) are left to the jury. Professor Williams argues that this "may lead to regrettable confusion". ³⁶ It may also, as a result, lead to injustice.

3. Reasonableness - A Reappraisal

Reasonableness, it has been remarked, "... is a variable concept." ³⁷ This may well be so, but it is the writer's contention that there are certain fundamental principles which may, and should, be laid down as given law, guidelines offering certainty to citizens, judges and lawyers. The notion that in, say, a case where a woman is tried for killing a man who attempted to rape her, the decision as to the overall propriety or otherwise of such action should rest in the hands of the jury seems to offend all notions of justice - yet the application of an amorphous standard of reasonableness would appear to require just that. Professor Williams's regret over the "abandonment of the relative precision of the old law" ³⁸ is justified not as a matter of juridical tidiness, but out of serious concern at the injustice which may arise in a particular case.

In essence, then, the objection is that it should not automatically be for the jury to decide questions of proportion. The main reason for this is the danger of wide and arbitrary variations from case to case, region to region, and the possibility that subjective factors may enter uninvited into

the minds of the jury in their deliberations. ³⁹ Regional attitudes as to whether for example rape is "all that bad a thing" such as to justify deadly force can surely have no place in the books of law.

Indeed, it is argued here that any certainty which may once have existed has been lost from legal authorities, by virtue of the use of reasonableness; and that it ought to be returned to the texts. Insofar as reasonableness comprises not just necessity but also the evaluative issue of proportion, the writer cannot support the sweeping notion that it is an issue of fact *tout court*. The presentation for consideration by the jury, of such a serious issue as say, killing to prevent rape, would in effect be to leave to the triers of fact a vital issue of legal policy. ⁴⁰

True, one might argue that proportion will vary from period to period - the comments by the Court in *Taylor v Mucklow* ⁴¹ and other cases demonstrate this sufficiently. But the writer fails to see how this makes reasonableness and proportion necessarily issues of fact. This merely demonstrates what we already know, namely that the law is in a constant state of change.

In certain clear cases, it is submitted, proportion should be a straightforward question of law. Hence, to continue our example of rape, it would be open to a judge to direct a jury that assuming they found the accused had reasonably feared such an attack of this nature, then as a matter of law, homicide would be justifiable where necessary. Consequently, the only issue for them would be the straightforward factual one of whether the force used in defence went beyond what was reasonably necessary.

At the other end of the spectrum, if an individual used, say, deadly force to prevent a trifling assault, under the misapprehension that the law permitted this, this would not avail him as a defence - *ignorantia juris non excusat*. ⁴²

It should be obvious furthermore, that the writer is not suggesting that whether the accused believed in facts such as to satisfy proportion would be a question of law. That is clearly one of fact. But the question

of whether on these facts such action was reasonable, proportionate or whatever, is arguably largely one of law.

Such an approach would have three major advantages. Firstly, it would simplify the jury's task, in asking them to make just one simple decision of fact, rather than one of policy and one of fact. Secondly, it would often be fairer to the accused, in removing from the jury the possibility of convicting for the simple reason that, while believing his or her version of events, their value judgement did not coincide with that of the defendant. And as a corollary, the third point - perhaps missed by many - is that equally, proportion would work to exclude the possibility of a finding of private defence where there was total disproportion between what the triers of fact found to be the apprehended attack, and the seriousness of the riposte. Thus, the principle could be applied to prevent the possibility of an abusive application of private defence by a jury, this time in favour of an accused. ⁴³

Such advantages arguably militate in favour of the above approach, where appropriate, and indeed this simplified manner of presenting the plea to a jury is typified in some caselaw in both England and Scotland. ⁴⁴

Proportion - Certainty in the Law

It is worthwhile stressing at this point the real crux of the debate, lest one lose sight of the most basic issue. In essence, *proportion reflects society's views of the seriousness of a given crime*. How far one may go in preventing it articulates society's condemnation in almost quantifiable fashion - the graver the crime, the greater the maximum force which may be justified in its prevention. In light of this, a legal system which set down what forms of attack might be prevented by, say, deadly force where such force proved reasonably necessary, would arguably be preferable to one which left the overall calculation as a vague analysis in the hands of both fate and the jury. In effect, the issue of proportion would already be determined by the law, and 'packaged' within each situation where the law envisaged that deadly force might on occasions be justified.

Indeed, according to some caselaw, this is the approach followed in Scotland. The enumeration of instances where the use of deadly force might be justified appeared in the judgement of Lord Keith in the case of Crawford v H.M.A. ⁴⁵, where he expressly mentioned the cases of homicidal assault, rape, housebreaking and robbery. ⁴⁶ This approach is, in principle, to be approved.

"In principle", though, because it is regrettably the case that the precise scope of instances justifying deadly force seems rather restricted. For while there are some authorities both North and South of the border suggesting that deadly force might be permissible against serious bodily harm *tout court*, ⁴⁷ it must remain open to question whether these reflect the position today - if they ever did - at least in Scotland, for the majority of modern judicial statements there are still very much posited in terms of danger to one's life. In those cases involving straightforward direct violent attack upon the person, at the end of the day, the Scottish judiciary remain unwilling to stretch matters beyond the instance of homicidal assault, and perhaps rape (of which there is, it seems, no reported case relating to private defence). This has been stressed in the recent decision of Penning v H.M.A., ⁴⁸ where at trial it was said that self-defence (i.e. homicidal self-defence) would *"only apply if the accused's life has been put in danger"*, ⁴⁹ an attitude which merely reaffirms earlier judicial statements. ⁵⁰ It therefore seems almost certain that counsel who relied upon Lord Keith's additional cautious suggestion that the threat of *"immediate serious injury ... leading to permanent injury or demembration"* might also be included, ⁵¹ would be received with little enthusiasm from the bench, well supported in their attitude by the authorities. ⁵² (Some judges' charges, however, reveal an ambiguity which is not merely confusing to academics in their assessment of the state of the law, but regrettable in the uncertainty which they may create in the minds of a jury.) ⁵³

In England, the old authorities, like their Scottish counterparts, spoke of homicidal self-defence where the individual was so hard-pressed by his assailant, his back literally to the wall ⁵⁴, that such violence was necessary to avert one's imminent destruction. In R v Rose ⁵⁵ Lopes, J., told the jury that the shooting must have been *"absolutely necessary for the preservation of the mother's life."* ⁵⁶ Nonetheless, while one may question

the restrictive nature of the scope of proportion, one may also appreciate the fact that the evaluative decision was presented as already decided in law.

Yet it is precisely the question of grievous bodily harm seen in its own right, and not as a synonym for fatal injuries, that is the most pressing case. For it is clear that if a jury is ever going to acquit of criminal homicide on the basis of private defence, it will do so where the accused feared for his life. But as things stand at present, it seems most likely that where the fear was simply one of serious harm, then an accused cannot confidently expect to escape conviction - yet the danger of serious harm is no doubt very great in many instances. Once again the writer would argue that the recent advances of medical science should not be seen as a justification for the imposition of unjust and burdensome standards upon those who find themselves the victims of violent attack.

So far as rape is concerned, it is the writer's contention that this is *inherently* of such gravity that deadly force may, where necessary, be justified, a view shared unanimously by the authorities down the ages, although instances are surprisingly rare. As a matter of law, therefore, one should, where necessary, be justified in using extreme force to ward off such an aggression. ⁵⁷ Likewise the threat of a sodomitical attack. However, despite the curious rejection of such a possibility by the High Court of Justiciary in the case of *McLuskey v H.M.A.*, ⁵⁸ it is submitted that given in particular the chances of venereal disease being transmitted in cases of rape, the threat posed by Aids demands that the Scottish judiciary overturn *McLuskey*, ⁵⁹ irrespective of previous value-judgements, for in effect the danger has changed entirely in nature.

Clearly, though, the list could not be exhaustive, for one then enters the grey area which divides the serious from the trivial. It is here, in the writer's opinion that the test of reasonableness would be appropriate - for it undoubtedly has a legitimate place in the law relating to private defence. Beyond the enumerated instances, it would be a matter for the jury to decide whether the interest sought to be protected justified the violence inflicted. ⁶⁰ Hence, just as it is in the writer's opinion, incorrect to say that reasonableness (and by extension proportion) is a question of fact, so

too a bald assertion that proportion is a matter of law would equally be incorrect. Each case will vary according to its own circumstances.

Furthermore, it is submitted that reasonableness would also be appropriate in those instances where the nature of the attack was such as to preclude any time for reflection, and hence evaluation. In such cases of almost automatic reaction, it would arguably be more just to leave the matter in the hands of the jury simply on the lines of whether the prosecution had satisfied them that the defendant's reaction was unreasonable. ⁶¹

4. France

In France, the *Cour de cassation* has on numerous occasions reiterated its view that *la légitime défense* is primarily for the *juges du fait*, and that it will not, and cannot as such, interfere with their determinations. ⁶² As the comment to Cr 5 juin 1985 (Muller) ⁶³ states, "*Il appartient aux juges du fond d'apprécier si la défense est ou non en disproportion avec l'attaque et se trouve justifiée par un péril commandant la nécessité des blessures faites.*" ⁶⁴ Hence the numerous occasions on which the Court has refused to entertain *pourvois* concerning private defence, on the grounds that they contained mixed questions of fact and law. ⁶⁵

However, as argued above, while the application of private defence will clearly depend upon the circumstances of each individual case, it would be wrong, both descriptively and normatively, to assert that the matter is purely one of fact. ⁶⁶ For the *Cour de cassation* reserves its right of *contrôle* over the lower courts, to ensure that on their finding of the facts, the decision to accept or reject a plea of private defence is arrived at on a sound legal basis. Hence while the facts may well be "*souverainement constatés*" and outwith the control of the Court, ⁶⁷ the decision arrived at on these facts will escape cassation by the Supreme Court only insofar as it is sufficiently reasoned, is properly based in law, and contains no contradictions in its *motifs*. ⁶⁸

The writer can do no better than address the reader to the words of M. le Président Rolland of the Cour de cassation, who, in an extra-judicial statement, described the position thus:

"Une première observation est la volonté de la Cour de cassation d'assumer son contrôle sur tout ce qui n'est pas constatation matérielle. L'affirmation d'un droit sans explication, n'est pas, elle l'a rappelé bien souvent, une motivation suffisante, et l'appréciation des conséquences à tirer des constatations matérielles n'est souveraine que si elle ne présente ni insuffisance ni contradiction..."

Nul ne saurait donc s'étonner qu'en matière de légitime défense elle tienne à vérifier si l'appréciation de cette légitime défense est justifiée par les constatations matérielles faites. Il ne saurait y avoir d'un côté des constatations matérielles souveraines et de l'autre une appréciation qui serait également souveraine alors qu'elle serait sans rapport ou même contredite par les faits constatés." 69

A consequence of this is that the tribunaux correctionnels and the cours d'appel 70 must, under pain of nullity, justify their decisions by specifying the conditions of private defence which they find present or wanting in the case before them, 71 and the Court has repeatedly quashed decisions on the grounds that the lower courts had left it unable to verify if private defence had been properly applied, and hence unable to exercise its supreme power of contrôle. 72

Hence, a simple affirmation that the riposte was "disproportionate" or that the action taken did not constitute "la légitime défense" will not suffice and any such decision runs a serious risk of being overturned. The Cour de cassation will demand to know more about the precise nature of the altercation, as the following judgement demonstrates:

"...Mais attendu que la Cour d'appel n'a pas par ces énonciations et constatations caractérisé l'existence de la légitime défense dont elle a fait bénéficier les inculpés; qu'elle n'a ni précisé le rôle respectifs de chacun d'eux, ni établi qu'ils aient été l'objet

d'une agression contre laquelle ils auraient été obligés de se défendre, ni constaté qu'une attaque aurait précédé les coups portés, et qu'elle s'est bornée à affirmer la proportion de ces coups avec une attaque dont la gravité reste indéterminée; qu'elle n'a pas dès lors justifiée sa décision et que le moyen doit être accueilli..." 73

However, French law suffers from the same absence of precise rules as to, say, justifiable homicide, which we associate with the present law in England. The 'open-ended' approach finds reflection in the bare statements of Articles 328 and 329, since, despite the ideal opportunity of a codified text, they provide no enumerative examples of proportion - indeed, as we saw earlier, they make no direct mention of proportion itself.

In addition, we examined the serious conceptual difficulties which arise out of the seemingly arbitrary use of the terms "necessity" and "proportion" - the objection being that in some cases the precise meaning attributed to them will be unknown, while in others the problem is that they are misunderstood, but that they are used interchangeably, in a variety of forms. 74 The ultimate irony is that while the French courts are the only ones to recognise and use both terms regularly in their judgements, the manner in which they are deployed serves to undermine the very ease of analysis which the separation of terms is supposed to ensure.

More specifically, one is left to the somewhat surprising conclusion, in the writer's opinion, that the French judiciary are in effect applying a French variation of the reasonableness test in all but name. This practice is likely to continue so long as the legislative provisions remain in their present form, and so long as the ambiguity surrounding the twin test of private defence continues - both in the courts and in the faculties of law.

5. The Infractional Nature of the Riposte

The nature of the defence needs to be examined in one final way, an inquiry precipitated by a vigorous debate in France, which has continued throughout the greater part of this century, and with particular intensity since 1967.

One may accept that private defence can justify a whole range of offences, against person and property, from murder, parricide, ⁷⁵ and assault (aggravated or otherwise), ⁷⁶ to sequestration, ⁷⁷ theft, ⁷⁸ and damage to property. ⁷⁹ Equally, it is established by caselaw that it may form the basis of a defence to weapons offences ⁸⁰ and may justify a variety of other miscellaneous breaches of the criminal law. ⁸¹ The one question which has divided the French, particularly the judiciary from the academics, is whether the notion of private defence is compatible not only with voluntary, but also what are termed involuntary infractions.

A. Private Defence and Involuntary Offences - The Debate

Several arguments have regularly been advanced by those favouring incompatibility. Firstly, it is argued, surely the entire notion of an involuntary movement runs wholly against the underlying principle of private defence, which understands that a criminal charge is rebutted by the assertion that in face of an attack one took action to neutralise that attack. Such a notion appears to demand the conscious deliberation which attends volitional behaviour. ⁸²

Secondly, the text of Article 328 of the *Code pénal* speaks of acts of violence "*commandés par la nécessité actuelle de la légitime défense*". ⁸³ How then, on the basis of this interpretation, could one say that involuntary acts were truly defensive, when there is no possibility of psychological command?

The final argument seeks support in the fundamental precept applicable to the act of the defence, which we have in this and the preceding chapter sought to examine at length - namely, that there must be some measure

between the gravity of the attack and that of the defence. Accepting this, then, it is inconceivable that one may rightly be said to have either sought or achieved this measure by way of involuntary actions.

Such arguments have done little to persuade the majority of commentators, who in the late 1960s and early 1970s were particularly loud in their condemnation. Firstly, they replied, Article 328 in no way distinguishes between voluntary and involuntary acts. It refers simply to "*l'homicide, les blessures et les coups*" and does not actually specify that the riposte has to be voluntary. ⁶⁴ The provision is of general application and, as counsel in several cases argued, such a distinction would represent an unwarranted gloss upon the legislative text. ⁶⁵

Related to this was the other argument that since private defence is a plea in justification, and not an excuse, subjective factors had no place in determining whether the plea was made out. A justification being objective in nature, the only question was whether the basic requirements regarding necessity and proportion were satisfied, and if so, acquittal should follow. ⁶⁶ One should not look behind the practical results of the altercation. Again, to import subjectivism, requiring an intention to defend oneself as a prerequisite to the plea, would be an unjustifiable addition to the law. ⁶⁷

Thirdly, the criticism based on the requirement of a measured response, both necessary and proportionate, was not decisive. Clearly, one might not gauge it consciously; but, several writers pointed out, it was quite possible that by chance the riposte would be commensurate in its violence with the attack, and thus fulfil the requirements of the plea. In any case, the triers of fact assessed this question of measure *a posteriori*. ⁶⁸

Last of all, the proponents of "*la conciliabilité*" answered with their own powerful and substantive criticism, which has received wide support. A theory based on incompatibility would lead to absurd, anomalous and unjust results - if X sought to defend himself with a gun and deliberately shot dead his attacker he would be charged with murder and merit acquittal on the grounds of private defence, while if his attacker was killed because the gun unexpectedly went off while the attacker was held at bay, X would not be

able to plead private defence, since the charge would be one of "homicide involontaire".²⁰

So far as the courts are concerned, the lower tribunals tended towards the theory of incompatibility. In T.C. Lyon 16 juillet 1948,²¹ which we discussed in Chapter One the Court came down firmly in this respect (though in the event it viewed the charge laid as quite inappropriate and was at pains to point out that the accused had acted with intent):²¹

"... Attendu qu'il est à peine besoin de souligner la contradiction qui résulte du fait de déférer un prévenu au tribunal correctionnel sous la prévention de blessures involontaires, d'une part, et d'admettre, d'autre part, au cours des débats que ce dernier a agi en état de légitime défense; Attendu en effet que des coups portés et des blessures faites pour sauvegarder sa propre existence ou celle d'autrui ne sauraient être involontaires." ²²

Nine years later the Tribunal correctionnel de Mayenne, in a well-known judgement which we shall examine later in this study, ²³ made it plain that it considered that the two notions were incompatible. ²⁴

B. The Arrêt Cousinet

The Cour de cassation finally declared itself in the now-famous decision of Cr 16 février 1967 (Cousinet), ²⁵ without doubt one of the two most momentous judgements on the law of private defence in twentieth century France. ²⁶ The facts were simple. C had become involved in an altercation with a drunkard, one M, and during the fight had struck him in such a way as to make him lose his balance and fall, as a result of which M sustained a serious injury. C was prosecuted for involuntary wounding ("blessures involontaires"), and was convicted. The Cour d'appel de Riom rejected his appeal against conviction, from which decision he appealed to the Cour de cassation. So far as the present debate is concerned, his counsel attacked the decision from two angles. Firstly, and with private

defence in mind, he argued that his client's acts fell more properly to be considered as voluntary. Secondly, and without prejudice, he argued that since Article 328 made no distinction, then even if the *Cour de cassation* insisted the offence was involuntary, the *Cour d'appel* should nonetheless have checked for private defence.

In its judgement, whose impact was matched by its remarkable brevity, the court declined to pronounce on such arguments, and baldly stated:

"Attendu que par les circonstances qu'ils énoncent les juges du fond ont caractérisé les éléments constitutifs du délit de blessures involontaires reproché au prévenu; que dans ces conditions, ils étaient fondés à rejeter le fait justificatif de légitime défense allégué dans ses conclusions; qu'en effet, la légitime défense est inconciliable avec le caractère involontaire de l'infraction."

It was stated at the time, ⁹⁷ and has been repeated since ⁹⁸ that the decision represented a reversal of earlier caselaw. However, it is quite evident from the reports that the *Cour de cassation* had not, in fact, taken a clear stance on the matter, ⁹⁹ and if anything, it seems to the writer that Cousinet merely confirmed expressly what had already been lurking in the Court's (admittedly ambiguous) earlier decisions. ¹⁰⁰ Be that as it may, its position by 1967 could not have been stated more emphatically. Precisely what it meant, however, is quite another matter.

C. Cousinet - The Background

The consequences of Cousinet have been remarkable, if for nothing more than the confusion which, through its attraction of criticism and comment, the decision has both engendered and brought into the open in academic circles. However, this confusion is largely to be forgiven, prompted as it was by some questionable prosecutorial practices and judicial interpretation, which themselves found their source or explanation in the very text of the *Code pénal*. The decision, which has been met with general disapproval from the commentators, ¹⁰¹ crystallised this background, reducing its import to a

meagre paragraph which belied its precise significance. To comment on Cousinet and its consequences it is first necessary to understand the context in which the judgement was rendered.

Two factors explain the manner in which the case was both prosecuted and decided. Firstly, when the Code was promulgated, it made no provision for cases of excessive defence, that is, situations where the defender had a right to use some force, but in one way or another went beyond the due measure of his or her riposte. Nor indeed has it ever been amended to accommodate such an eventuality.

As a result, the practice of "*correctionnalisation judiciaire*" came to be applied in a number of cases of supposed excessive defence. This technique, most often applied by the prosecuting service or the investigative service (the "*juges d'instruction*"), serves many different purposes. Its effect, however, is simply to prosecute as *délits*, offences which are really classed in French law as *crimes* - the most serious class of all and therefore within the exclusive competence of the *Cour d'assises*. The former are offences of much less gravity, and are judged by the *tribunal correctionnel*, entirely composed of professional magistrates, with correspondingly reduced sentences applicable to them. ¹⁰²

For example, in a case of attempted murder where the actual harm inflicted was *not serious*, the authorities would ignore the intention to kill, and libel the offence as a *délit* of voluntary wounding, turning a Nelsonian blind-eye to the factors which make it a *crime*. ¹⁰³ Advantages are that the time, expense, complexity and general burden to all parties, which accompany a jury trial and its preparations, are circumvented by this procedure. Another very important tactical reason is that "*Elle assure la répression dans ces cas où la Cour d'assises ne l'assure pas*", ¹⁰⁴ for the rigours of the law in the nineteenth century had led juries to pronounce scandalous acquittals. Through *correctionnalisation*, the authorities will often increase their chances of obtaining a conviction, while foregoing the greater severity of punishment which the more elusive assizes finding of guilt would have permitted.

In consequence, partly out of solicitude for the plight of an accused who had overreacted in his defence, and partly no doubt to ensure conviction, the authorities would prosecute for *homicide involontaire* or *coups et blessures involontaires* (depending on whether a fatality had occurred or not). Thus, a charge of *homicide involontaire* was laid in Cr 12 novembre 1875 (Veuve Jouan c Millon).¹⁰⁶ There, two drunkards, M and J, had had a mild dispute and punch-up. M was being led home by a third party who had separated them, when J quickly came up to him again, muttering words of bravado. M left his escort, and pushed his adversary on the chest, with the sole intention of going peacefully on his way home. Unfortunately, J fell and suffered a fractured skull from which he died. The lower court found M not guilty, and this was confirmed on appeal, but the *Cour de cassation* overturned the decisions, on the basis that M had been at fault in the way he acted.

Similarly in Cr 12 décembre 1929 (Lecointe),¹⁰⁶ which once more involved two drunkards. In that case, Lecointe was followed home by a fellow customer, Larivière, with whom he had argued in a bar. Though he was unarmed, Larivière, by his state of agitation, prompted Lecointe to pull out a revolver, load it, and fire several bullets to frighten his adversary. Undeterred, Larivière seized his arm, whereupon the gun somehow went off, killing him. Lecointe was convicted of *homicide involontaire*, the court holding his actions to have demonstrated "*une imprudence inexcusable*", irrespective of whose finger actually triggered the shot. The decision was affirmed on appeal, and by the *Cour de cassation*.

Equally, in the famous decision of Cour d'appel d'Alger 9 novembre 1953 (M.P. et Bussutil c Zeghoudi),¹⁰⁷ which we examined in Chapter One, a finding of not guilty on a charge of voluntary wounding was overturned on appeal by the prosecutor and *partie civile* in a case where a youth had intervened to prevent a young boy from throwing stones at a group of children, but in his entirely good faith intervention, had grabbed the boy's arm with such force that he fractured it. While clearly sympathising with the accused, the *Cour d'appel* substituted a conviction of *blessures involontaires*.

It would therefore seem, from the unfortunate circumstances of the altercation in Cousinet, that one witnessed the action of correctionnalisation by the authorities, who deemed the case to be one of excessive self-defence.

The second reason underlying Cousinet lay in the fact that as distinct from homicide, so far as wounding offences are concerned there is no room in the *Code pénal* for what have been termed "*les infractions prêterintentionnelles*", that is, those instances where the results of one's actions went far beyond what one intended. ¹⁰⁸ They were distinguishable from cases of simple negligence, in that "*le résultat a été partiellement voulu*". ¹⁰⁹ Equally, though, the intention was not to inflict harm of the full enormity which ensued. The most obvious example is where one strikes a deliberate blow without at all intending to kill, but one's victim dies. In such cases of homicide Article 311 provided the appropriate half-way house, punishing what have become generally known as *les coups mortels*, or more explicitly, "*coups ... ayant entraîné la mort sans intention de la donner*" (i.e. voluntary manslaughter). While this is still a "crime", the advantages to an accused of being charged with this rather than murder were obvious. No such provision, however, existed for cases where the unintended injuries did not result in death, and so in Cousinet, since the victim had not died, the authorities had to choose simply between the full charge of voluntary wounding, or involuntary wounding, and in the event chose the latter.

An interesting example of the interplay of this crime and correctionnalisation at trial was provided by a decision of the Cour d'assises du Haut-Rhin 30 avril 1952. ¹¹⁰ In facts depressingly similar to those of Jovan and Cousinet, the accused had been tried for *coups mortels* following an incident when, accosted by a rowdy drunkard who had been molesting passersby, he pushed him roughly out of his path, whereupon the latter fell in such a way that he was killed. No doubt unwilling to convict for *coups mortels* the Court instead exercised its supreme right to "requalify" the charge, and convicted him of involuntary manslaughter. ¹¹¹

D. The Misleading Debate

However, it is submitted that the underlying principle of the above cases demands some reassessment. For leaving aside the question of the "qualification" (i.e. the nature of the offence actually at issue) one has the impression that there is some confusion between the act of the accused and the results of his actions. True, the offence of *coups mortels*, for example, recognises that the two are not always consonant, but the unarticulated assumption of many commentators in that case is that there was excess.¹¹² *A fortiori* where the offence charged is involuntary. However the additional argument that one should be particularly careful when dealing with drunkards does not commend itself to the present writer, for, if anything, their intoxicated state may well contribute to their belligerence and dangerousness.

The question of unintended consequences in reasonable private defence was recognised early last century in Hinchcliffe's Case,¹¹³ and we are grateful to Gordon for having set the position out quite clearly:

"Self-defence is a defence to a charge of intentional homicide, and if A decides that it is necessary to kill B he will be entitled to succeed in a plea of self-defence if his decision was at all reasonable.

In most cases, however, A does not make up his mind to kill B; he merely assaults B in order to defend himself from an assault by B which itself may not be homicidal in intent. In such a case the important question is not whether the death of B was justifiable, but whether A's assault itself was justifiable. What is measured is not B's death against A's danger, but the violence used by A against the violence threatened or used by B.....

If A's assault on B is justified by B's assault or by his apprehension of B's assault on him, A is not guilty of homicide if B dies as a result. If, for example, B punches A, and A retaliates by punching B, A is not guilty of homicide if his punch kills B who has a weak heart or falls and breaks his skull: in such a case A has caused B's death in the course of a "lawful" act, and provided his retaliation was reasonable no question of "criminal negligence" can arise, so that A is guilty

neither of murder nor of culpable
homicide." 114

The problem with unintended consequences, particularly where they are serious, is the very great temptation to assume that the 'excessive' results are the consequences of an excessive act. 115 True, this will often be a proper reflection of the facts, but this is by no means always so.

This was appreciated with commendable judicial insight in the case of People v Keatley. 116 There, K's brother had an argument with one B, arising out of a game of "pitch and toss", and this led to a tussle between them. K came to his brother's defence and struck against B what one witness described as "a box but not a powerful one". Unfortunately, B fell and was found found to be dead, having suffered a puncture wound to the head which medical evidence suggested was caused when he hit the ground. K was convicted of manslaughter but this decision was overturned on appeal. The trial judge had clearly assumed that the killing bore direct correlation with the assault, in terms of intention. In prising the two apart, the court implicitly upheld the argument of appellant's counsel, who had addressed the true issue with admirable clarity: "Once the jury were satisfied that the blow was lawful its consequences - and the fact that Edward Byrne died - are irrelevant. If the accused was justified in striking the blow there could not properly be a conviction." 117

A similar disavowal of indiscriminating result-oriented reasoning was shown in the decision of Cour d'assises de la Seine 29 novembre 1961. 118 There, a dispute had somehow arisen between the accused, E, and A, a taxi-driver who had just taken his fare. A drove off hurling insults, then inexplicably stopped after a few metres, got out and rushed towards E, who, ignoring his aggressiveness, was about to enter a doorway. A grabbed him violently by the jacket, and in an effort to disengage himself, E punched him in the face, whereupon he fell and sustained a fatal fracture of the skull. In judging on civil reparation following acquittal on a charge of *coups mortels*, the Court expressly declared E to have acted in private defence, and expressly remarked that the means of E's riposte had not been disproportionate. 119 And should one wish a further example of what one

might call "dissociated result" private defence, the writer would point to the judgement in Cr 25 mai 1977 (Vamo), ¹²⁰ which he considers to be as near-perfect a text-book case of private defence as one can imagine.

The decision arose out of an incident when Vamo, who was drunk, was being led out of a café by G, a sixteen-and-a-half year old boy. W tried to strike his escort with a bottle, but G dodged the blow and struck him one punch, as a result of which W fell to the ground and was seriously injured. Charged with *coups et blessures volontaires*, G was found not guilty, a decision which was confirmed on appeal. The *pourvoi* against this finding was rejected by the *Cour de cassation*. ¹²¹

In light of the above, one may well wonder whether in some or all of the French cases described above, where an *involuntary* label was attached to the acts of the accused on the assumption that they revealed an excess in defence, it would not have been more accurate to interpret the injuries received as the tragic *consequences* of a nonetheless reasonable act of defence. Cousinet itself might be so included, though since the decision was an *arrêt de principe* which revealed scant factual information, it is difficult to be sure.

But these are not the only criticisms which arise out of the Cousinet case. For, given the habit of *correctionnalisation* in cases of supposed excessive defence, the affirmation by the *Cour de cassation* of the principle of incompatibility paved the way for a further series of difficulties directly associated with this practice. For it is important to realise that in strictly legal terms *correctionnalisation* is, in fact, *unlawful*, though it has become firmly established and recognised as a means of judicial expediency. ¹²² If then a risk of abuse inevitably attends any practice within a legal system, this is all the more acute when the practice lacks any official authority in the first place. As a result of the prevailing view on excessive defence and its decision on involuntariness, the *Cour de cassation* found itself dealing with several major *pourvois* where the facts showed that charges under an involuntary heading were blatantly misconceived.

B. Subsequent Developments

Cousinet was particularly harsh in its consequences for some, given the opinion which certain magistrates formed that the mere fact that the charges laid fell under the involuntary heading justified a peremptory refusal to consider a plea of private defence. ¹²³ When one considers in particular that *correctionnalisation* occurred often in the context of supposed excessive defence, such a decision would represent an indefensible example of the judiciary putting the cart before the horse, foreclosing the one issue upon which an accused would seek to rest his defence, and which would clearly require due consideration before a conviction could be properly returned. ¹²⁴

The effect therefore was that the French courts found themselves on occasions in the remarkable position of hearing appeals from individuals who rejected the involuntary label, and actually sought to be accused of more serious offences. The motive was obvious - if successful, such appellants could put themselves in the running for an acquittal from a voluntary offence, on the basis of private defence. The decision, though, was a calculated gamble, for they were thereby exposing themselves to the risk that they would end up convicted of - and sentenced for - the more serious offence. This gambit was successfully played in the *affaire Legras*, one of the most sensational cases of the 1970s, which we shall consider later. ¹²⁵ Suffice to say here that the accused, a garagist who had booby-trapped his country-house with fatal results, successfully challenged the competency of his prosecution for involuntary manslaughter, ¹²⁶ and as requested went to trial on a charge of *coups mortels*, only to be finally acquitted by the jury. ¹²⁷

In Cr 31 janvier 1974 (Gosse) ¹²⁸ the facts were that G was one of several *gendarmes* who had surrounded a villa in which R, whom they suspected of being a burglar, had hidden. Instead of opening the door, he went up onto the roof. Challenged by G, he replied "*Foutez le camp ou je vous bute*" ¹²⁹ and made a sudden gesture with his hand. Fearing the worst, G opened fire, fatally wounding R. The investigating magistrate delivered an *ordonnance de non-lieu* against charges of *coups mortels*, effectively shutting the case, on the grounds of private defence. ¹³⁰ Somewhat remarkably, the *Chambre d'accusation de la Cour d'appel de Douai* quashed this decision, and,

imposing a *correctionnalisation*, it sent him for trial on a charge of *homicide involontaire* (i.e. involuntary manslaughter). The Court concluded that Gosse, whose view had it seems been partially obstructed, had committed "*une imprudence et une maladresse*" in firing at R, who, in the darkness, was simply a vague outline. The public prosecutor and Gosse both appealed against this decision to the *Cour de cassation*, which, under the presidency of Justice Rolland, reversed the decision. Having noted that Gosse deliberately fired, the *Chambre d'accusation* was duty bound to reply to the Prosecutor's own submissions that the case was one of private defence, and its failure to do so justified reversal.

It will be noticed that the decision is somewhat similar to that of T.C. Lyon 16 juillet 1948 (G. c D.), ¹³¹ where the *Tribunal correctionnel* requalified the charge into a voluntary offence, before finding the accused not guilty by reason of self-defence, and the case reports reveal several decisions of the courts, including the *Cour de cassation*, which demonstrated the requalification of charges from an involuntary to a voluntary nature, before private defence was found or pleaded. ¹³²

In Cr 5 février 1979 (Godard). ¹³³ G appealed against his conviction for *homicide involontaire* (i.e. involuntary manslaughter). A group of youths had been committing acts of violence in a bar, and after using a cosh, G sought to drive them back by grabbing his shotgun and a box of cartridges which he believed he had all emptied of their leads. Seeing one of them, P, smash a glass door in the bar with a car-jack, G fired twice. Having failed to deter him, G fired two more cartridges, one of which by mischance had not been emptied. He appealed, but the conviction was affirmed, the *Cour d'appel* finding that he had committed "*une faute d'inattention grave*" in not noticing the different aspect and weight of the live cartridge. G's *pourvoi* was successful. The *Cour de cassation* overturned the confirming judgement of the *Cour d'appel*, for in so firing the shots, which even when they were blank, constituted acts of violence, the appellant had *prima facie* committed the crime of *coups mortels* - having noted this, the *Cour d'appel* had misdirected itself in deciding as it did. ¹³⁴

Critique

These judgements thoroughly merit approval. Most noticeably in Gosse the idea of an involuntary charge was quite inappropriate, and the *Cour de cassation* rightly reared against any such proposition. A voluntary act is still voluntary even if its consequences are not intended. As the Court in the Godard case remarked at the very outset of its judgement:

"Attendu que les dispositions de l'article 309 du Code pénal sont applicables lorsqu'un acte volontaire de violence a été accompli, quel que soit le mobile qui l'ait provoqué, et alors même que son auteur n'aurait pas voulu le dommage qui en est résulté." 135

This view accurately describes the situation in terms of the provisions of the *Code pénal*, it is submitted. And interestingly - indeed somewhat curiously in light of the facts of Cousinet - these words merely reaffirmed the position adopted by the *Cour de cassation* as far back as 1961, 136 and which the Court had since had cause to repeat. 137

The abusive use of correctionnalisation in this domain was firmly condemned in no uncertain terms by Président Rolland of the *Cour de cassation* who, in an extra-judicial statement in 1974 declared:

"Un acte volontaire ne peut être à la base d'un délit involontaire, même si les conséquences ont disparu de la volonté de son auteur. Un homicide volontaire ne devient un homicide involontaire parce que la mort n'a pas été voulue, il devient un crime de coup mortel et pas autre chose.... On ne remédie pas par des disqualifications aux abus de la légitime défense: ou elle a été admise, et il faut le dire, ou elle ne l'a pas été, et il faut en tirer les conséquences." 138

The *maladresse* and *imprudence* of Articles 319 and 320 have indeed little to do with private defence, and far more to do with the drivers of vehicles, for the *homicide involontaire* of the case reports is none other

than the involuntary manslaughter associated in the minds of common lawyers with such issues as vehicular and industrial accidents, and medical malpractice - though as we have seen this did not prevent questionable qualifications being applied in the past. This is not to say that the distinction between "*homicide et blessures par imprudence*" and their voluntary equivalents is easy to draw, as the most eminent of scholars have reiterated over the years. ¹³⁹ But, whatever the *Cour de cassation* had meant in 1967, the above cases ensured that it rejected in Cr 20 mai 1980 (Veuve Abdellaoui) counsel's submission that *homicide involontaire* was at issue, where the *Cour d'appel* had confirmed the *ordonnance de non-lieu* rendered in a case where a policeman had pulled out his pistol and shot dead an individual who had attacked him with a flick-knife. ¹⁴⁰

It is tentatively suggested, then, that the current - and true - scope of Cousinet is now (if it was not then) far more restricted than many commentators would have us believe. And while some criticisms may perhaps have had force in the few years immediately after Cousinet, there is room for believing that they are now quite out of place, in light of the firm stance against dubious *correctionnalisation* which the *Cour de cassation* has adopted in cases such as Gosse. ¹⁴¹ Cousinet, its background and its aftermath all combined to produce a legal morass in which criticism and counter-criticism often occurred at cross-purposes, complicated by the failure to differentiate between excessive defence, "dissociated result" defence, intention and involuntariness.

If Cousinet represented a final flirtation with the principle of *correctionnalisation* in supposed cases of excessive defence, that period would appear to be well and truly over. It seems likely that were such a case to come up again, the proper qualification would be one of *coups mortels*, in other words voluntary manslaughter - while the final disposal of the accused would rest with the good judgement of the jury. Be that as it may, the effect of Cousinet has in fact been to create a misleading debate. For the real reason underlying the decision, and its associated caselaw, was in fact the existence of a supposed or actual excess in the defensive riposte. That - and not the question of involuntariness as such - properly explained the convictions. In somewhat circular fashion, one may say that rightly or wrongly on the facts, private defence was really excluded because the rules

of private defence had not been satisfied. Involuntariness was essentially a collateral, and for the most part, inappropriate factor. *Prima facie* the true scope of Cousinet is, in the writer's opinion, really restricted to three different, though not entirely distinct, situations, which we may now examine.

F. Cousinet - A Reappraisal

1. The Cousinet 'Anomaly'

It is submitted that this 'anomaly', described earlier, is in fact not a true anomaly at all, for the premises on which it is based are, in light of the above, erroneous. Firstly, some commentators who present it still appear to assume that the laying of *involuntary charges* justifies the peremptory refusal of any plea of private defence, a practice which cannot - or at least should not - happen. ¹⁴² Secondly, underlying their criticisms appears to be the assumption that the practice of correctionnalisation is still appropriate for suspected excessive defence, which, given the above decisions, is quite wrong. ¹⁴³ In both descriptive and normative terms, then, their arguments appear to be incorrect.

The third criticism one might level is that the critics present the anomaly by in fact offering for comparison two quite different situations. Thus one writer posited the anomaly by pointing to the possibility of a successful plea where *"une personne dont la vie se trouve menacée tue son agresseur"*, under a murder charge, while *"poursuivie pour homicide par imprudence (elle a manipulé maladroitement l'arme avec laquelle elle tenait en respect son agresseur et le coup de feu mortel est parti)"*, the same person could not expect to succeed in his or her plea. ¹⁴⁴ But not only has the charge been altered in the second example, the facts presented have also been totally modified, and therefore it is difficult to accept an anomaly from the comparison of two quite dissimilar situations.

This last example leads on to the fourth objection, which, it is submitted, illustrates most clearly the defect in the anomaly arguments. For a moment's reflection will reveal that it effectively begs the question.

One's interpretation will depend upon whether the bullet would have been justifiable in the first place.

Take the first of the two situations posited. If one was in serious danger, then the shooting will, assuming all other conditions are satisfied, be justifiable. But even if in drawing the gun out of one's pocket it discharged spontaneously and happened to kill the attacker before one had the chance to aim and deliberately fire, this would all have occurred within a context of defensive action.

On the other hand, consider the second situation posited. If while the aggressor is held at bay the gun somehow goes off, killing him, then there are two options. If this was the result of negligence, through an "imprudence" or "maladresse", then a conviction for *homicide involontaire* would be merited. But it would be involuntary manslaughter *not* because there is excessive defence, *nor* because there is dissociated defence, but precisely because the act - if indeed the discharge of the gun merits such a description - *is not taken in self-defence*. Certainly, the defender wishes to keep himself from harm, and dissuade the attacker, but it would be a distortion of the truth to claim that he intended to do so by shooting. His defensive act was the presentation of the gun, *not* the shooting, which lay neither in his intention nor his volition. ¹⁴⁵ The *imprudence* of the *homicide involontaire* is attached to the final result, and the homicide was not called for. In this respect then, the principle of incompatibility as per Cousinet would seem to be properly applicable. ¹⁴⁶

It might on the other hand be the case that the discharge of the weapon was wholly unforeseeable - for example where there was an inherent defect in the trigger mechanism, which no-one could reasonably have been expected to anticipate. If the presentation of the gun was reasonable, then one would deserve to be acquitted. But the fundamental point is that this would proceed on the basis of accident and not private defence.

11. Accident

This plea is often confused with private defence, but it is conceptually distinct. ¹⁴⁷ It is submitted that this ambiguity arises from such thinking as is reflected in the words of Lindley, J. in *R v Knock* ¹⁴⁸ when he stated to the jury that "*supposing a man attacks me and I defend myself ... and I knock him down and thereby unintentionally kill him, that killing is accidental.*" For while in one sense that is true, it would be more proper to describe the case as one of dissociated result self-defence, in that, as in *Keatley*, ¹⁴⁹ which we saw earlier, the death was the unintended consequence of a reasonable defensive act.

A good illustration of the true distinction is shown in the Scottish case of *Mackenzie v H.M.A.* ¹⁵⁰ There the appellant had been charged with the murder of one A. At trial he claimed that following a struggle between the two of them he produced a knife as a deterrent to further violence, whereupon A lunged at him and thereby impaled himself upon the knife. The trial judge withdrew from the jury the defence of accident, but left self-defence, and they convicted of culpable homicide on the ground of provocation. The High Court of Justiciary upheld his appeal against conviction, finding that the trial judge had been wrong to withdraw the defence of accident, but equally, their Lordships were at pains to stress that a special defence of self-defence which had been lodged was entirely inappropriate, since it was directed to the production of the knife, when the charge was murder by stabbing, an allegation which the defence had consistently denied. ¹⁵¹

An important French case raising both of the above issues is that of *Cr 9 juillet 1984 (M...)*. ¹⁵² There, during an altercation between L and S, the latter threatened his opponent with a pick. L's nephew, M, went to get his rifle, to protect his uncle, but S grabbed it by the barrel, and thereby caused the gun to go off, fatally wounding him. M was convicted of *homicide involontaire*, which was confirmed on appeal, and the *Cour de cassation* rejected his *pourvoi*. It is noticeable that the lower courts seemed to rest their case on the fact of disproportion between the means of the attack and the riposte. It is submitted, however, that this is - in one sense at least - somewhat misleading. For would the riposte have been disproportionate had

M stood some fifteen feet away with the gun pointed at or towards the deceased ? It was only by the action of the deceased himself that the gun assumed a far greater importance in the entire incident, and it is telling to note that the *Cour de cassation* expressly pointed out that "*un coup de feu est parti le blessant mortellement, le tir étant provoqué par la traction de l'arme opéré par Saheb*". In that case, one might have thought that an acquittal should have followed, the incident being but a variant of the "impaling situation" hypothesised in *MacKenzie*. But one may surmise that the Court found that it was open to the lower courts to have found some measure of fault in the first place in the handling or presentation of the weapon. It did incidentally take the opportunity to reaffirm the principle of *Cousinet*, declaring solidly "*en effet, la légitime défense est inconciliable avec le caractère involontaire de l'infraction*." In this respect, then, one may on balance agree, in both descriptive and normative terms, that the principle of incompatibility announced in *Cousinet* was rightly applied here.

c. Reflex Action

One important French case is of relevance here. In Cr 7 février 1978 (Vignuzzi), ¹⁵³ the *Cour de cassation* had to consider the *pourvoi* of an individual who had been convicted of *homicide involontaire* by the *Tribunal permanent des forces armées*. ¹⁵⁴ The Court rejected his *pourvoi*, noting that the military tribunal had declared that private defence could not be entertained the moment "*la poursuite ne s'inscrit pas dans le contexte de coups et violences volontaires, mais dans celui d'un ensemble de gestes impulsifs non contrôlés par la volonté*."

As a preliminary, it might be observed that the statement - referring as it does to "*la poursuite*" - seems to uphold the peremptory refusal of private defence which the writer has, with others, criticised earlier. However, the judgement is somewhat equivocal, for the latter half of the sentence suggests that the court was in fact speaking with the benefit of hindsight, and referring more to the substance than the form of the case. More important is precisely this question of substance.

It is clear that the case was decided according to the principle enunciated in Cousinet. Just how it was applied here, though, is impossible to say, since no other facts emerge from the judgement. It is submitted, however, that if the acts were indeed truly involuntary, then the question of private defence was rightly excluded. This is not to say, however, that conviction would always be proper in such a case, for it would always be open to a court to find that the charge fell, for lack of intent. The point is simply that were there to be an acquittal, it should not proceed on the basis of private defence.

However, if the reflex action took place within the context of a general defensive intention then arguably the situation would be quite different. As we saw in Chapter Two, the law does not demand detached reflection in the face of violent attack, and clearly in some cases the attack may be so unexpected that the defender responds by conditioned reflex, acting then, only to think later. We saw a prime example of this in the decision of the Cour d'appel de Nancy 9 mars 1979 (Bastien).¹⁵⁵ There may be a reflex action, but it would be quite wrong to deny the underlying defensive intent.¹⁵⁶ It is submitted that in such instances the Court would, as in Bastien, rightly examine for necessity and proportion, and find or reject private defence accordingly, for in the writer's opinion consideration of the plea would be quite appropriate. In such a case an involuntary classification would be quite misconceived, and therefore, as things stand at present, the plea would stand, or fall (in the case of excess), on the voluntary heading.¹⁵⁷ Cousinet would therefore not enter into it.

G. Conclusion

Ultimately, therefore, in the writer's opinion Cousinet merits guarded approval, partly for the fact that, as he has endeavoured to demonstrate, its true reach is far more restricted than has hitherto been accepted by the overwhelming majority of commentators. This examination has attempted to show that the serious criticisms levelled at the decision have, certainly since the clarification of the judgement in Gosse, lost much if not all of the force they may have once had, though they are perpetuated to this day.

Where, however does that leave the question of excessive defence ? Certainly, in light of the above, the difficulties into which the law has run through the absence of any specific provision in the Code has created problems for the judiciary and others. ¹⁵⁰ Equally relevant are the difficulties which face accused persons who go beyond the bounds of a reasonable defence. At present, the only available disposals would be a finding of provocation under Article 326, which produces a substantial - and mandatory - reduction in the sentence available to the judge, or the application of the peculiarly continental "*circonstances atténuantes*" which, susceptible of a very wide meaning, allow the magistrates or jury, in slightly similar fashion, to override the express provision of the law regarding the punishments applicable to a given offence. ¹⁵¹

However, it appears inequitable that someone who acted while defending himself against an attack but exceeded the permitted limits should be in no better position than one who receives the benefit of a traditional plea of provocation. In the latter case, considerations of good faith are displaced by the very nature of the person's response in great passion and anger to the grave insult, physical or otherwise, which he has suffered. Equally, the somewhat arbitrary finding of "*circonstances atténuantes*" seems a rather aleatory method of providing justice in an individual case.

Nonetheless, it seems that an important distinction should be made, in recognition of the fact that the term "excessive defence" may cover a whole host of situations. True, if one breaches the requirements then, as we saw in Chapter Two, one in turn effectively becomes an attacker, but this is not to say that all share the same degree of culpability. If, in fact, the defender had rounded on his assailant, and was now seeking revenge, then there seems no reason why he should not indeed fall under the weight of the law of voluntary offences, subject to provocation or *circonstances atténuantes*.

On the other hand, if his actions were performed in good faith, and in the belief that he was defending himself, but it is established that there was an excess, a true excess in his riposte, then the situation calls for a more measured approach to his actions. It is submitted that in such circumstances, reason and justice militate in favour of the view, common to

several commentators, that in the absence of any coherent or formalised approach to excessive defence, the time has come for the inclusion of an express provision in the *Code pénal* which would provide for conviction for either involuntary manslaughter or involuntary wounding, of those persons who, in the unfortunate circumstances of a violent attack, fail to live up to the standards which the law, in its wisdom, has demanded of them.

APPENDIX

1. The example is taken from Howard, C., *Two problems in Excessive Defence* (1968) 84 LQR 343, at 352-3. A more plausible example, frequently cited, is that of the person who shoots an apple thief raiding his orchard; c.f. Cour d'assises de la Loire 28 janvier 1920, cited Bouzat et Pinatel, *supra* 363 fn. 5.
2. *Report of the Royal Commission on the Law Relating to Indictable Offences* (1879) Cmd. 2345, p.11.
3. Early in his chapter on private defence, Professor Williams stresses the separate natures of the two concepts, *Textbook*, *supra* 503.
4. See Dicey's criticism of their terminology, *The Law of the Constitution*, *supra*, pp. 490-1. It is submitted that, as but one example of the uncertainty and confusion surrounding the two concepts of necessity and proportion, the following words of L. Morris in the landmark judgement of Palmer v Reginam (1971) 1 All ER 1071, 1088, are distinctly unhelpful: "If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation."
- 5.. E.g. Rowe v Hawkins 1 F & F 92, per Crowder, J. (to the jury): "The defendant, after desiring the plaintiff to desist, was justified in endeavouring to obtain his release, using no more violence than was necessary for that purpose ... That he used no more violence than was necessary for the purpose of extricating himself appears from the fact that, with all that he used, he did not succeed in doing so."; Lewis v Arnold & Ors. (1830) 4 Car. & P. 354; People v Keatley (1954) IR 12, per Maguire, C.J. at 16.
6. Cp. *Avant-Projet de Code Pénal*, Livre I (Dispositions générales), Articles 35 & 36, Ministère de la Justice, Juin 1983, where the term is included as an express requirement of legitimate defence.
7. "Cette idée de proportionnalité paraît comprise dans la notion même de la nécessité; il n'est jamais nécessaire de causer un mal considérable pour éviter un petit dommage." (*Code Pénal Annoté*, *supra*, A328 no.17); and later: "... la nécessité de la défense cesse lorsqu'elle est en disproportion avec le danger couru" (*id.* A328 no. 38). Some writers in similar manner, deduce the notion of proportionality from Article 2 of the European Convention of Human Rights, by its use of the words "absolutely necessary". There seems little doubt, in the writer's opinion, that the spirit of the Convention accords with the requirement of proportionality, but one may question the absence of any express reference to it in the text.
8. See Blustein, J, *Proportionality and the Psychotic Aggressor: A Moral Analysis* (1978) 10 Ottawa Law Review 88, 92-93.
9. See for example Pradel, J. et Varinard, A. *Les grands arrêts du droit criminel* (Paris, 1984) Vol.1, pp. 205-207; Chauveau et Hélie, *supra*, 183; Sieurac, *supra*, 72; Decocq, A. *Droit Pénal Général*, *supra*, 321; Le Sellyer, *supra*, 262; Gèze, *supra*, 83; Fuzier-Herman, *supra*, Vol. 26, *Légitime Défense* no. 46; Aussel, J.-M. *La Contrainte et la Nécessité en Droit Pénal* in *Quelques Aspects de L'Autonomie du Droit Pénal* (Stéfani, G., éd.) Paris, Dalloz 1956 291 - cp. p.289 Indeed, the following words

of Pradel et Varinard (p.205) are neatly illustrative of the manner of French thinking on the two concepts and hence the resultant confusion: "En d'autres termes, la condition de la nécessité est comprise dans celle de proportionnalité: si l'acte de défense est proportionnel, il était forcément nécessaire et, à l'opposé, si le juge le considère comme disproportionné par rapport à l'agression, c'est qu'il n'était pas nécessaire." It is one thing to show that French writers (and judges) use the term "proportion" - it is quite another to understand - let alone demonstrate - just what they mean by it.

It is interesting to note that while most modern writers do speak of "la légitime défense" in terms of (1) necessity and (2) "mesure" or "proportion" (Merle et Vitu, *supra* 517; Stéfani, Levasseur et Bouloc, *supra* 350-351; Decocq, *supra* 320), Professors Pradel et Varinard dispute this (*supra*, 205) citing the arrêt Devaud in support.

10. Cr 21 novembre 1961 B.C. no. 474. See also Cr 16 juillet 1879 B.C. no. 249 (Procureur-Général). This latter case is convincingly criticised on its merits also, by Garçon, *supra* A328 no.28.
11. Cr 7 décembre 1971 B.C. no. 338.
12. See also Cr 12 février 1985 L.84-90.373 (Patarin), where what was at issue was in essence a breach of the necessity requirement, where violence had been used against an adversary who was clearly retreating. For a baffling example by an academic of the confusion between necessity and proportion see *Informations*, RSC 1979 935, 939: "...En revanche, l'invraisemblance du péril peut rendre la défense disproportionnée."
13. See e.g. Cr 9 juillet 1984 L. 82-92.182 (C...) (lower court); Cr 20 février 1984 L. 83-91.144 (A...); T.C. Ambert 5 juin 1956 G.P. 5-7 septembre 1956 (Malcurat c Convert). See also R v Sharp & Johnson (1957) 1 All ER 577; Williams, G. *Textbook*, *supra* 503 ("the harm feared") and 506 ("the apprehended evil"). C.p. R v Julien (1969) 2 All ER 856, per Widgery, L.J. at 857, and R v Wardrope (1960) Crim. L.R. 770.
15. La Fond, J.Q., *The Case for Liberalizing the Use of Deadly Force in Self-Defense* (1983) 6 University of Puget Sound Law Review 237, 277.
16. To borrow an expression of Professor Williams's; see *Textbook*, *supra* 509 fn. 15.
17. See also *id.* La Fond also makes the pertinent comment (pp. 250-1) that "... the common law (of Washington State) seems to presume that an aggressor who does not use or threaten to use a deadly weapon does not intend or will not cause death or serious bodily injury." He also states (p.276) that "(a)s a practical matter, most juries are unlikely to conclude that a victim reasonably feared death or serious bodily injury at the hands of the aggressor unless the aggressor was armed with a deadly weapon or other deadly force." While his remarks are clearly aimed at one particular jurisdiction, and though one might question the generality of such a statement, one might point to the trial verdict in Shannon (1980) 71 CAR 192, as an indication that here in Britain, juries themselves are perhaps not immune from such notions.

18. *The Criminal Law of Scotland*, *supra*, 761. The reason for the present writer's qualification is to be found in Professor Gordon's reference to "the violence threatened or used by B."
19. (1985) 81 CAR 110; *supra*, Chapter 2.
20. For a similar view on this point, see Ashworth, A.J. 1975 CLJ 281, 296-7.
21. See *infra*, Chapter 4.
22. (1973) Crim. L.R. 750.
23. *Id.* at 751. For a similar type of case, which was decided in favour of the appellant, see *R v Hussey* (1924) 18 CAR 160.
24. *Cockcroft v Smith* (1706) 2 Salk. 642.
25. *R v Abraham* (1973) 3 All ER 694, 696.
26. E.g. *Hanway v Boulthbee* (1830) 1 M & Rob. 15, per Tindal, C.J. at 18; *Townley v Rushforth* The Times 5 December 1963; 1964 Crim. L.R. 590; *Palmer v Reginam* (1971) 1 All ER 1077, (1971) 55 CAR 223, (1971) Crim. L.R. 649; *R v Field* 1972 Crim.L.R. 435; *Taylor v Mucklow* (1973) Crim. L.R. 750; *R v Shannon* (1980) 71 CAR 192 (trial judge cited at 194); *R v Cousins* (1982) 2 All ER 115, per Milmo, J (djc) at 117; *R v Pagett* (1983) 76 CAR 279 (trial judge, cited at 284); *R v Williams* (1984) 78 CAR 276 (trial judge cited at 278-9); *Debbie Bird* (1985) 81 CAR 110; Stephen, J., *A General View of the Criminal Law of England*, *supra* 122; Williams, G. *Textbook*, *supra* 503 et seq. and 495 et seq.; *Cummings v Granger* (1977) 1 QB 397, per L. Denning at 405; also *Devlin v Armstrong* (1971) NI 13, per Lord MacDermott at 34. Cf. *R v Duffy* (1966) 1 All ER 62; Reference under section 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975) (1976) 2 All ER 937.
27. *H.M.A. v Carson & Another* (1964) SLT 21, per L. Wheatley at 21.
28. Smith, J.C. & Hogan, B, *Criminal Law*, *supra*, 326-7; *Halsbury's Laws of England*, *supra* Vol. 11 para. 1180; *R v McInnes* (1971) 3 All ER 295, per Edmund Davies, LJ at 302.
29. The purposes of the two 'defences' are quite different, though overlapping in some respects. Not only is the latter more positive and aggressive than the former, but it extends far beyond the scope of private defence, serving different needs and highlighting different policy issues. Also, it has been convincingly argued that the intention of Parliament was never to do away with the common law of private defence (see Ashworth (1975) CLJ 282, 285, and Harlow, C. *Self-Defence: Public Right or Private Privilege* (1974) Crim. L.R. 528. See also Williams, G., *Textbook* *supra* 1st edition p. 455, 2nd edition p. 505. For a consideration of the arguments relating to the use of force by the police, see the interesting article by Colin Greenwood, *The Evil Choice* (1975) Crim. L.R. 4. Compare the position of the French police, as described *supra* Chapter 2.

30. Reference under section 48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975) (1976) 2 All ER 937; R v Cousins (1982) 2 All ER 115 per Milmo, J (djc) at 117; R v Gladstone Williams (1984) 78 CAR 276 per LCJ Lane (djc) at 279; Daylin v Armstrong (1971) NI 13, per L. MacDermott at 33-4.
31. E.g. Bullard v The Queen (1957) 42 CAR 1, per L. Tucker (djc) at 9; Palmer v Reginam (1971) 1 All ER 1077, per L. Morris (djc) at 1088.
32. R v Abraham (1973) 3 All ER 694, per Edmund Davies, LJ (djc) at 697: "The last thing we seek to do is to lend support to the misconception that any prescribed words have to be used in giving the direction..."
33. (1971) 1 All ER 1077, 1084.
34. Williams, G. Textbook, *supra*, p. 509.
35. E.g. Shannon (1980) 71 CAR 192; Attorney-General's Reference (No.2 of 1983) (1984) 1 All ER 988; Pagett (1983) 76 CAR 279; Debbie Bird (1981) 81 CAR 110; R v Cousins (1982) 2 All ER 115, per Milmo, J (djc) at 117: "What is reasonable in the circumstances is always a question for the jury", citing and approving Attorney-General for Northern Ireland (Reference No.1 of 1975) (1976) 2 All ER 937, per L. Diplock at 947: "What amount of force is 'reasonable in the circumstances' for the purpose of preventing crime is, in my view, always a question for the jury in a jury trial, never a 'point of law' for the judge"; Townley v Rushforth (1964) Crim. L.R. 590; Halsbury's Laws of England, *supra*, paras. 1179 and 1180 c.f. R v Duffy (1961) 1 All ER 62, per Edmund Davies, J (djc) at 64. It is worth noting that frequently stress is laid upon the fact that reasonableness is to be decided in light of all the circumstances: e.g. Shannon (1980) 71 CAR 192; Duffy *supra* at 64; Halsbury's Laws of England, *supra*, paras. 1179-80.
36. *Id.* at 503.
37. Commentator to Taylor v Mucklow (1973) Crim. L.R. 750, 751.
38. Williams, G., Textbook, *supra*, p. 509
39. *Id.* at 506: "The rule involves a community standard of reasonableness, and is left to to the consideration of the jury. It can bear hardly on the defender, but much depends on the way in which judges and juries administer it; and that, again, may depend on whether they happen to empathise with the frightened defender or with his injured (or dead) assailant. If the defendant's reaction was disproportionate, the attack he feared or was resisting will go only in mitigation."
40. Professor Williams refers elsewhere in his Textbook (p.557) to "the deplorable tendency of the criminal courts to leave important questions of legal policy to the jury."
41. (1973) Crim.L.R. 750. And see generally, the comments on the decision in Hussey (1924) 18 CAR 160.
42. It will be appreciated that even if one accepts the conclusions of the courts in R v Williams (1984) 78 CAR 276 and R v Jackson (1985) RTR

257, (see *supra* Chapter 2) these decisions are irrelevant so far as the present debate is concerned, for they concern the question of the existence (or belief as to the existence) of the attack, not the manner of defence. As the commentator to Gladstone Williams points out, "The question whether, in the circumstances which the defendant believed to exist, it was justifiable to use the degree of force in fact used, or to use any force, still depends on whether it was reasonable to do so." (1984) Crim. L.R. 163, 164. Cf. Ashworth, A.J. *supra* (1975) CLJ 282, 304; Smith, J.C. & Hogan, B., *Criminal Law*, *supra*, 330; Gordon, G.H. *The Criminal Law of Scotland*, *supra*, 335: "Whether or not retaliation in self-defence is justifiable is a question of law, and if on the facts as the accused believes them to be self-defence is not justified it is irrelevant for the accused to say he thought it was." See Clark v Syme (1957) JC 1, per L. J.-G. Clyde at 5: "A misconception of legal rights, however gross, will never justify the substitution of the law of the jungle for rules of civilised behaviour or even of common sense ... He knew what he was doing ... The mere fact that his criminal act was performed under a misconception of what legal remedies he might otherwise have had does not make it any the less criminal."

43. Hence the interest in the retention of proportion by such writers as Ashworth, A.J. (1975) C.L.J. 282, esp. 296-7. Ashworth favours what he calls a "human rights" approach to private defence, which, he argues, takes greater account of the rights of all participants in a situation of private defence, including the attacker. He contrasts this with the "standfast approach", which puts greater weight upon the interest of a would-be defender. Hence, Ashworth's arguments for greater certainty in the law are directed more towards avoiding too liberal an approach towards private defence.

With respect, however, the present writer would point out in his opposition to the "human rights" approach, that any such redistribution of the value attached to the respective parties in a situation of attack and defence, by definition means that the interests of the defenders would carry less weight, while those of the attackers would carry more. It is submitted that such a proposition places an unacceptable burden upon those who find themselves victims of attack. Indeed, it is the writer's contention that present law still encourages too severe a view of an accused who claims that he acted in private defence, and that any modification in the law should be in the direction of favouring the defender. Arguably, this is precisely what is presently occurring in English law, in such areas as that of retreat in face of one's attacker.

44. E.g. R v Rose (1884) 15 Cox 540; H.M.A. v Doherty (1954) JC 1.
45. (1950) JC 67.
46. *Id.* at 71.
47. See e.g. R v Weston (1879) 14 Cox C.C. 348, per Cockburn, C.J. at 351; R v Hewlett 1 F & F 91, per Crowder, J. at 91; Stephen, J., *A Digest of the Criminal Law*, *supra*, p. 252; Halesbury's *Laws of England*, *supra*, Vol. II, paras. 1179-80; Smith & Hogan, *supra*, p. 325.
48. (1985) SCCR 219.

49. Id. per Lord Mayfield, cited at 220.
50. E.g. H.M.A v Kizileviczius (1938) JC 60, per Lord Jamieson at 62: "The first of these (requirements) is that the accused was in imminent and immediate danger to his own life in short, that what he did was necessary to save his own life."; Owens v H.M.A. (1946) JC 119, 125; McLuskey v H.M.A. (1959) JC 39, per Lord Clyde at 83-4; c.f. Robert McAnally (1836) 1 Swin. 210, per L. MacKenzie at 217 (note though that the case was one of parricide). In Owens, of two sentences from the judge's charge, quoted by the Court, and of which the second was "... the defence must be against an attack which reasonably is understood to be one likely to cause danger to life before it justifies the use of a lethal weapon", the Court only faulted the first one.
51. (1950) JC 67, 71.
52. In addition to the caselaw already cited see Hume, 1. 223 "... the pannel must have killed, to save his life. For it does not bring him within the benefit of this plea, however the case may be as to others, that he killed to avoid some great indignity, or even some bodily harm" (original emphasis); Alison, 1. 20; MacDonald, *supra*, 106; Dunedin, *Encyclopædia*, *supra*, para. 288; Gordon, G.H. *The Criminal Law of Scotland*, *supra*, p.763. See however, Anderson, *supra* 17 (though he cites no authority in support of his inclusion of "grievous hurt") - and compare in any case p.148. see Gordon, G.H., *The Criminal Law of Scotland*, *supra*, p.761 for criticism of Lord Keith's words in Crawford.
53. See for example, H.M.A. v Doherty (1954) JC 1, where Lord Keith, in charging the jury, stated within the same sentence (p.4): "First of all, there must be imminent danger to the life or limb of the accused, to the person putting forward this defence; there must be imminent danger to his life and limb..." (emphasis added).
54. *Supra*, Chapter 2.
55. (1884) 15 Cox 540.
56. Id. at 541. Cp. e.g., R v Redman (1978) VR 178 ("death or serious bodily injury") and see S v Jackson (1963) (2) S.A. 626 A.D. - in the latter case the appellant's conviction of culpable homicide was set aside on the grounds that the trial judge had failed to direct the jury that not only a fear of death, but also a fear of grievous bodily harm, might justify the shooting of the deceased: "Whatever may be the position in English law, our Courts have taken the view that a person is justified in killing in self-defence not only when he fears that his life is in danger but also when he fears grievous bodily harm." (per Hoexter, A.J.A. at 628).
57. If the state of the laws really does leave rape and private defence as an open question, it is, in the writer's opinion to be thoroughly regretted. See e.g. Smith & Hogan *supra*, p. 325 "The whole question is somewhat speculative. Is it reasonable to kill in order to prevent rape ?..." It is precisely this "speculative" element which the writer seeks to exclude from the determination of cases involving serious attacks. N.B. The authors do in fact discuss the matter under the heading of "Killing in the Course of Preventing Crime or Arresting

Offenders", but as we have already seen, they view the rules of prevention of crime and private defence as largely indistinguishable. Although he disagrees on this particular point, Professor Williams applies the criticisms he makes of the reasonableness test of section 3(1) of the Criminal Law Act 1967, to the present state of the law of private defence. See *Textbook*, *supra*, pp. 495 and 509.

58. (1959) JC 39.

59. Cf. Anderson, *supra* 17: "The privilege of defence of the person extends to the right of causing death in the following cases: ... (4) where there is assault with intent to gratify unnatural lust"; Stephen, *New Commentaries*, *supra*, p. 100: "The English law likewise justifies a woman killing one who attempts to ravish her ... And no doubt the forcibly attempting a crime of a still more detestable nature may equally be resisted by the death of the unnatural aggressor." For France, see e.g. Priolaud, A., *Du Droit de Légitime Défense* (thèse) Angoulême (1903) p. 57. Also, Grotius, H., *Le droit de la Guerre et de la Paix* Bk. I, Ch. II, SVII., p.212; Pufendorf, *Le Droit de la Nature et des Gens*, *supra*, Bk. II, Ch. V, SXI, p.298.

60. See e.g. Williams, G., *Textbook*, *supra*, pp.509-10: "The list need not be exhaustive, for the rule could be that extreme but necessary force can be used in specified cases (a), (b), etc., "and in all other cases where such force would not be regarded by any reasonable person as disproportionate to the threat."

61. On this very point of differentiating between these two types of cases, see Lepointe, B., *Le Diagnostic Judiciaire des Faits Justificatifs*, 1969 RSC 547, 559-61. It is interesting to note that in his famous dictum in *Palmer* (1971) 1 All ER 1077, 1088, Lord Morris does refer to "a moment of unexpected anguish" (emphasis added) cf. Ashworth, A. J., (1975) CLJ 282, 299-300.

62. Cr 19 mars 1835 B.C. no.102 (Margaine); Cr 26 mars 1857 B.C. no.126 (Pioger); Cr 2 août 1866 D.1866.5.493 (Hinderer); Cr 5 novembre 1875 B.C. no.305 (Rétaux); Cr 5 août 1881 B.C. no.193 (M.P. c Brière); Cr 16 juillet 1897 B.C. no.249 (Thil); Cr 31 juillet 1947 B.C. no.192 (Izar et Sakhejm); Cr 9 décembre 1948 B.C. no.283 (Holtzer); Cr 21 décembre 1954 B.C. no.423 (Trombino); Cr 14 avril 1955 B.C. no.299 (Gnaedig); Cr 20 novembre 1956 B.C. no.761 (Driot); Cr 17 janvier 1967 B.C. no.25 (Ruston); Cr 7 décembre 1971 B.C. no.338 (Pesleux).

63. B.C. no. 209; R.D.S. 1985.S.62.

64. R.D.S. 1985.S.62, 62.

65. E.g. Cr 20 avril 1982 JCP 1983.2.19958 (Veuve Diab et autre); Cr 13 décembre 1973 L.73-90.226 (Debrossard); Cr 13 avril 1976 L.75-91.196 (Veuve Delabesse); Cr 19 janvier 1977 L.75-91.496 (Abed).

66. Cf. Légal, A., R.S.C. 1955 313, 313.

67. For one of the clearest examples of this principle, see Cr 17 mars 1910 B.C. no.136 (Couriault). Cf. 7 décembre 1971 B.C. no.338 (Pesleux); Cr 17 janvier 1967 B.C. no.25 (Ruston); Cr 20 novembre 1956 B.C. no.761

(Driot); Cr 14 avril 1955 B.C. no.299 (Gnaedig); Cr 26 mars 1857 B.C. no.126 (Pioger).

68. Cr 15 septembre 1864 B.C. no.23 (Antonioti); Cr 23 juin 1887 B.C. no.237 (Cazalets); Cr 18 octobre 1972 B.C. no. 293, L.71-93.637 (Thieblemont et Thieblemont); Cr 28 juillet 1975 GP.1975.2.713; L.75-90.256 (Leblanc); Cr 26 février 1980 L.79-91.511 (Dhamelin-court); Cr 16 septembre 1985 L.84-93.875 (C...). For two other instances where cassation was clearly necessary on the grounds of defective judgements, see Cr 2 décembre 1915 B.C. no.228 (Rouillé) and, more recently, Cr 8 mai 1974 B.C. no.168 (Cilione). In the former, the judgement declared that the appellant had been provoked by his adversary, and had merely defended himself - only to convict him. In the strikingly similar case of Cilione, the lower court had, in the words of the *Cour de cassation*, stated that "*Cilione 'après avoir évité plusieurs coups', s'était 'seulement défendu'...*" and then declared that self-defence was not made out. In the absence of further details, declared the *Cour de cassation*, the judgement fell to be quashed. See also Cr 13 novembre 1978 L.78-91.092 (Godet).
69. *XIV^e journées franco-belgo-luxembourgeoises de science pénale*, Pau 18-19 octobre, 1974 - Communication de M. le Président Rolland, p. 3. And see e.g. Cr 2 avril 1979 B.C. no.131 (Dor c Depiets): "*Attendu que si les cours d'appel sont investies du droit d'apprécier les circonstances qui peuvent dépouiller les faits imputés de leur caractère criminel, leur application à cet égard n'échappe au contrôle de la Cour de cassation qu'autant qu'elle n'est pas en contradiction avec les faits constatés par les juges.*"
70. But not the *Cours d'assises* - the decisions of the jury on the matter cannot be challenged before the *Cour de cassation*: Cr 17 septembre 1903 S.1906.1.150 (Brachet); Cr 8 août 1933 B.C. no.190 (ben Mohamed); Cr 5 octobre 1976 B.C. no.276 (Hallal).
71. Cr 26 avril 1884 B.C. no.150 (M.P. c Auriol); Cr 18 octobre 1972 B.C. no.293, GP.1973.1.100 (Thieblemont); Cr 8 mai 1974 B.C. no.168 (Cilione); Cr 28 juillet 1975 GP.1975.2.713 (Leblanc); Cr 10 octobre 1978 D.1979.IR.118 (Menard c Delente); Cr 20 décembre 1983 D.S.1984.S.236 (Bourlier); Cr 17 octobre 1973 L.73-91.043 (Delpuech); Cr 6 novembre 1975 L.74-92.087 (Danilo); Cr 13 novembre 1978 L.78-91.092 (Godet); Cr 16 septembre 1985 L.84-93.875 (C...); Garçon, *Code Pénal Annoté supra*, A328 no.119.
72. E.g. Cr 18 octobre 1972 B.C. no. 293, L.71-93.637 (Thieblemont et Thieblemont); Cr 6 novembre 1975 L.74-92.087 (dame Danilo); Cr 16 septembre 1985 L.84-93.875 (C...). See also the note to Cr 10 octobre 1978 D.1979.IR.118 (Menard c Delente): "*Il appartient à la Cour de cassation de vérifier si l'homicide commis dans les circonstances constatées par les juges du fait rentre ou non dans le cas de légitime défense*", and see the comment to Cr 3 juin 1869 D.70.1.287 (Frogier de Pontlevoy).
73. Cr 7 juin 1968 B.C. no.186 (Fage).
74. It may well be, though, that the fact that both necessity and proportion are often in consonance, goes some way to explaining this confusion of the two terms.

75. Robert McAnally (1836) 1 Swin 210; H.M.A. v Kizileviczius (1938) JC 60; R v Rose (1884) 15 Cox 540; c.f. Cr 29 mai 1879 B.C. no.107, D.1880.1.189 (ben Guerich); Cr 29 février 1984 L.84-90.166 (P...). Note that according to Article 323 of the *Code pénal*, parricide is never excusable. This, however, does not affect private defence, a *fait justificatif*.
76. See eg Stéfani, Levasseur et Bouloc, *supra*, p347; Bouzat et Pinatel, *supra*, 363; Garçon, *supra*, A328 no.109; Merle et Vitu, *supra*, 516; Soyer 117.
77. See eg Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, p347; Garçon, *supra*, A328 no.109; Merle et Vitu, *Traité*, Vol.1, *supra* p516.
78. Stéfani, Levasseur et Bouloc, *supra*, p347; Bouzat et Pinatel, Vol. 1, 363; Merle et Vitu, 516; Soyer, 117. This issue does not seem to attract the attention of British authors much.
79. Id.
80. See eg Attorney-General's Reference No.2 of 1983 (1984) 1 All ER 988; R v Fegan (1972) NI 80; Ryans v Hughes (1972) 3 All ER 412; c.f. Evans v Wright (1964) Crim.L.R. 466, Grieve v MacLeod (1967) JC 32. Note that where a person picks up a weapon for instant use in a moment of danger, he does not 'have it with him' in terms of the Prevention of Crime Act 1953 s.1. He therefore does not have the burden of proving that he had a reasonable excuse for possessing the weapon, and the provision does not apply - R v Giles (1976) Crim.L.R. 253. This case continued the interesting debate which arose out of Ohlson v Hylton (1975) 2 All ER 490.
81. See eg Tudhope v Grubb (1983) SCCR 350. The case turned on the plea of necessity, but it is submitted that Gordon is correct in his assertion (p352) that "this case is really an example of self-defence". The writer would, however, question his rationale that self-defence is an example of the defence of necessity. Some offences, though, will not be justifiable under private defence - cf. Cr 19 mai 1971 L.71-90.075 & L.70-93.017 (Tartaroli et autres), which concerned electoral fraud !
82. This argument is further strengthened in the eyes of those who argue that acts of private defence are not only acts of private protection, but also represent measures taken in the defence of society, in one's capacity as a private policeman as it were, and a *fortiori*, where one views private defence as a duty. The idea that one may perform such a function involuntarily is rejected by this line of thought; cf. for example Combaldieu, R., note to Cr 16 février 1967 JCP.1967.II.15034 (Cousinet).
83. By implication, of course, this also covers the situations envisaged in Article 329, by virtue of the introductory words to the latter: "Sont compris dans le cas de nécessité actuelle de défense, les deux cas suivants: ..." For an examination of the provisions of Article 329, see *infra* Chapter 4.

84. See e.g. Pradel, J. et Varinard, A., *Les Grands Arrêts du Droit Criminel*, supra, p.202, Pageaud, A., note to T.C. Mayenne 6 mars 1957 D.1957.J.458, 460; Cattan, V., *La Légitime Défense*, (thèse) supra, p.210.
85. "Alors qu'en statuant ainsi l'arrêt attaqué a ajouté au texte de l'article 328 du Code pénal, lequel, visant sans aucune exclusive toutes les blessures et les coups commandés par la légitime défense, sans se référer à leur caractère volontaire ou involontaire, n'exclut nullement de son application les actes de maladresse ou d'imprudence résultant de la défense de soi-même ou d'autrui." - counsel in Cr 11 octobre 1956 B.C. 630 (Samaran et autre). See also counsel in Cr 16 février 1967 B.C. 70; JCP.1967.II.15034 (Cousinet).
86. E.g. Pageaud, A., note to T.C. Mayenne 6 mars 1957 D.1957.J.458, 460; Légal, RSC 1958 869.
87. Chammas, *La Légitime Défense ...*, (thèse), supra, p.366.
88. Cattan, V., *La Légitime Défense*, (thèse) supra, p.192: "Certes, l'auteur de la défense ne pourra pas proportionner volontairement sa riposte. Il n'empêche que, par l'effet du hasard, la proportionnalité peut être, en fait, atteinte." Also Chammas, *La Légitime Défense ...*, (thèse), supra, p.366.
89. E.g. Cattan, V., *La Légitime Défense*, (thèse) supra, p.193. C.f. Delmas-St. Hilaire, J-P., *Jurisclasser*, *Faits Justificatifs* no. 94; Puech, M., *Les Grands Arrêts de la Jurisprudence Criminelle*, supra, p.279.
90. D.1948.550 (G... c D...)
91. Rightly so, in the writer's opinion. The charge was quite inappropriate in the circumstances of the case, and indeed in deciding to change the nature of the charge the Court was unwittingly suggesting the difficulties which were later to follow in the field of private defence and its interaction with involuntary acts.
92. Id. at 551.
93. *Infra*, Chapter 4.
94. 6 mars 1957 (M.P. c G.) D.1957.J.458, note Pageaud: "Attendu ... qu'il n'est d'ailleurs poursuivi que pour blessures par imprudence, et que l'élément involontaire du délit à lui reproché est inconciliable avec la notion de nécessité actuelle de défense, telle que prévue par l'article 329..."
95. B.C. no. 70; JCP.1967.II.15034 note Combaldieu; RSC 1967 659, obs. Levasseur; RSC 1967 854, obs. Légal.
96. The other being the arrêt *Reminiac*, Cr 19 février 1959 D.1959.161, note M.R.-M.P.; J.C.P. 1959.II.11112, note Bouzat. The decision is examined *infra*, Chapter 4.
97. Combaldieu, note, JCP.1967.II.15034.

98. Cattan, *supra* p.203.
99. Cf. also Puech, M, *Les Grands Arrêts de la Jurisprudence Criminelle*, *supra*, p.277; Légal, A., RSC 1967, 854, 854; Dontenwille, H., *Rapport: La Dernière Evolution Jurisprudentielle en Matière de Légitime Défense in XIV^e Journées franco-belgo-luxembourgeoises de science pénale*, Université de Pau, 1974 - Rapport p.5.
100. In Cr 12 décembre 1929 S.1931.1.113, note Roux: "Attendu, d'autre part, qu'il résulte à l'évidence des constatations ci-dessus relatées que l'homicide d'ailleurs involontaire dont Lecoïnte a été déclaré coupable a été commis alors que la vie du demandeur n'était nullement en danger." (emphasis added). It is obvious from these words that it was the latter fact which formed the basis of the court's rejection of the *pourvoi*, and that the matter of involuntariness is subsidiary. Nonetheless, the Cour de cassation's view on the matter is evident. In Cr 11 octobre 1956 B.C. no.630 (Samaran) the Cour de cassation repeated a very similar formula, in rejecting the *pourvoi* of a man convicted for *blessures involontaires*. Again, the proper basis for the decision was the fact that the life of the appellant had not been in danger. See also Chammas, *supra* p. 365.
101. See e.g. Levasseur, 1967 RSC 659; Pradel, J. et Varinard, A., *Les Grands Arrêts du Droit Criminel*, *supra*, pp. 200-203; Puech, M., *Les Grands Arrêts de la Jurisprudence Criminelle*, *supra*, pp. 277-280; Delmas-St.Hilaire, *Jurisclasser Pénal, Faits Justificatifs*, nos. 94-7; Cattan, *La Légitime Défense*, (thèse) *supra*, pp.204 et seq.. C.p. Combaldieu, R., JCP.1967.II.15034.
102. For a detailed explanation of the practice of *correctionnalisation*, see Stéfani, Levasseur et Bouloc, *Procédure Pénale*, *supra*, pp.495-8.
103. The example is taken from Stéfani, G., Levasseur G., et Bouloc, B., *Procédure Pénale*, 12th edition, (Paris Dalloz, 1984) p.496.
104. *Ibid.*, at 498.
105. S.1876.1.281.
106. S.1931.I.113, note J.A. Roux.
107. D.1954.369., note Pageaud.
108. For a more detailed discussion of the issue, see Stéfani, G., Levasseur G., et Bouloc, B., *Procédure Pénale*, 12th edition, (Paris Dalloz, 1984) p.252.
109. Stéfani, Levasseur et Bouloc, *Droit Pénal Général* *supra*, p.252.
110. RSC 1953 308, obs. Hugueney.
111. *Id.*: "Dira-t-on: pieux mensonge ! Un geste, pour être impulsif, n'en reste pas moins un geste volontaire. Nous répondrons: heureux mensonge ! La cour d'assises du Haut-Rhin a mis le doigt sur une lacune de la loi et l'a comblée comme il siérait probablement de la combler par la voie législative."

112. For just one example, see Hugueney, L, RSC 1953.308, commenting on the decision of the *Cour d'assises du Haut-Rhin*: "L'ivrogne molestait les passants. En l'écartant de leur chemin, ils ne faisaient qu'user de leur droit de légitime défense. Et, ce qu'on reprochait à l'accusé, c'était seulement d'avoir commis un excès dans l'exercice de ce droit de défense."
113. (1823) 1 Lew. 161, per Holroyd, J. at 162: "She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing." C.f. *R v Knock* (1877) 14 Cox 1. See also Stephen, *General View*, supra, p.122: "I have, on several occasions, allowed, and even more or less invited, juries to acquit people of manslaughter who unintentionally and unexpectedly caused death by returning a blow in what the jury regarded as reasonable self-defence." Also, Barry, J (trial judge) cited in *R v McKay* (1957) VR 560, per Lowe, J at 564: "... If, on some view of the facts which escapes me, you are able to say that the prisoner's conduct was reasonable and that death was an unintended consequence of the reasonable exercise of force shown while exercising a legal right, then it would be open to you to acquit the prisoner." The question of unintended consequences arising out of a reasonable use of force appears to have been recognised by the Criminal Code Bill Commissioners of 1879: "... and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent." (emphasis added) Report, supra, p.11.
- 114a. *Criminal Law of Scotland*, supra, pp. 760-1.
115. The following statement by Aussel, representative of many, reveals the question-begging assumptions regarding private defence with which the present writer cannot, with respect, agree. Commenting on the decision of the *Cour d'assises du Haut-Rhin 30 avril 1952*, supra, he says: "... si l'ivrogne bousculait bien les passants et pouvait leur donner des coups, le passant ainsi agressé par un homme ivre n'avait pas le droit de le tuer. Il y avait donc en l'espèce excès de légitime défense." Aussel, J-M., *La Contrainte et la Nécessité en Droit Pénal in Quelques Aspects de l'Autonomie du Droit Pénal*, supra, p.253, at 290.
116. (1954) IR 12.
117. *Ibid.* at 13. Per MacGuire, C.J. at 15: "The fundamental question, therefore, was whether this blow was lawful or unlawful". It is submitted that it is precisely such situations which Lord MacKenzie had in mind when he stated in the case of *McAnally* (1836) 1 Swin. 210, at 217: "...self-defence may also justify the unintentional infliction of death." i.e. a case of what the French would class as *coups mortels*. Compare the interesting case of *O'Neill* (1967) 51 CAR 241. There, too, the accused had struck the deceased a light blow which caused him to fall back and strike his head on the pavement, from which he died. Considering his appeal against sentence, the Divisional Court referred to the appellant as "technically" not being able to rely on self-defence. One might distinguish this case from *Keatley* in that the appellant was a skilled boxer, who, in the eyes of the trial judge knew his own strength. It would not seem unreasonable, then, to assume that on an *in concreto* appreciation of the facts, it had been concluded that

this particular individual should have had greater control over the manner and circumstances of his defence. For other instances of apparently unintended consequences in private defence, see Debbie Bird (1985) 81 CAR 110 and R v Corrigan (1985) Crim.L.R. 388.

118. S.1962.143 (Veuve Aharonian et autres c Epfelbaum).
119. "Considérant qu'Epfelbaum n'a pas employé pour repousser Aharonian de moyens disproportionnés à l'attaque dont il était l'objet; qu'il en résulte que les coups mortels ont été commandés par la nécessité actuelle de la légitime défense d'Epfelbaum..."
120. L.76-92.457.
121. In any case the nature of the attack and the circumstances of the defender arguably justified the use of force which would foreseeably have caused the injuries in fact sustained by Wamo. There is indeed some suggestion by the lower court that this motivated their decision, though the words of the *Cour de cassation* do tend to suggest an interpretation based on 'dissociated-result' private defence.
122. Stéfani, Levasseur et Bouloc, *Procédure Pénale*, supra p.497: "Aussi bien, puisqu'elle va à l'encontre du caractère d'ordre public des règles de compétence, il n'est pas douteux que la correctionnalisation antérieure au jugement est une pratique illégale." (original emphasis).
123. Such an opinion seems to have had its roots in earlier caselaw - see for example the lower court judgement, cited in Cr 11 octobre 1956 B.C. no.630 (Samaran): "... en ce que l'arrêt attaqué a rejeté le fait justificatif de légitime défense invoqué par le prévenu, par le motif que cette excuse ne pouvait être envisagée dès l'instant que le prévenu était poursuivi seulement pour blessures involontaires..."; cf. Cr 7 février 1978 L.77-92.217 (Vignuzzi). This latter case must, however, be viewed in light of the shift in judicial thinking in relation to involuntary offences, since Cousinet and the fact that the terms of the judgement are ambiguous, as to whether it refers to the form or actual substance of the accused's case at trial.
124. For the varying opinions of academic writers on the matter, compare Puech, *Les Grands Arrêts de la Jurisprudence Criminelle*, supra, p.278 with Légal, A., RSC 1967 854, 858: "Une conception aussi radicale ne saurait à notre avis être retenue, car précisément, nous l'avons rappelé, l'existence de la faute d'imprudence ne peut être appréciée en pareil cas qu'en fonction de la circonstance envisagée, puisqu'elle dépend essentiellement d'une disproportion entre la gravité de l'attaque et la réaction qu'elle a provoquée. Et c'est seulement une fois cette disproportion constatée que le juge en conclura que par là même le délit se trouvait nécessairement réalisé." See also Bernardini, R., note to Cour d'appel de Nancy 9 mars 1979 D.1981.462, 467, who adopts the same stance as Légal.
125. *Infra*, Chapter 4, relating to the defence of property.
126. Cour d'appel de Reims 9 novembre 1978, S.1979.92, note Pradel; JCP.1979.II.19046, note Bouzat. In the circumstances, it is not surprising that the prosecution had been laid under an involuntary

heading, avoiding as it did a jury trial. The question though, is whether such a move by the authorities was justified in law, and this the *Cour d'appel* rightly answered in the negative.

127. *Cour d'assises de l'Aube* 20 novembre 1982 (unreported).

128. B.C. no. 49; G.P. 1974.I.278; L.72-92.321.

129. Politely translated as "Get lost or I'll do you in."

130. As he or she is obliged to do the moment a good plea in justification emerges from the facts.

131. G... c D...; *supra*. Chapter 1.

132. E.g. Cr 13 octobre 1976 L.75-95.352 (Dejean) - in that case, the *juge d'instruction* (i.e. investigating magistrate) had delivered an *ordonnance de non-lieu*, in proceedings for *blessures involontaires*. The *partie civile* had appealed, and the *Chambre d'accusation* first of all "disqualified" the charges into *blessures volontaires* instead, before confirming the *ordonnance* on the grounds of private defence under Article 329 (1) (as to which see *infra*, Chapter 4). The *Cour de cassation* rejected the *pourvoi*. Also Cr 30 octobre 1984 L.83-93.692 (Devoille), where events took a similar course, with the difference that this time the offence charged was one of homicide.

133. B.C. no. 49.

134. Note that where a court is confronted with proceedings in which the offence is charged as a *délit*, and the facts reveal that in reality the true offence at issue is more properly classed as a crime - for which the *cour d'assises* has exclusive jurisdiction - it must immediately declare itself incompetent to hear the case. See *Code de procédure pénale*, articles 469 (*tribunal correctionnel*) & 519 (*Cour d'appel*) and Cour d'appel de Reims 9 novembre 1978 RDS.1979.92, note Pradel; JCP.1979.II.19046, note Bouzat (Legras); Cr 17 mai 1977 JCP.1978.II.18869, note Bouzat (Marquet) (see *Cour d'appel* decision); and Cr 2 avril 1979 B.C. no.131 (Dor) (see *tribunal correctionnel* decision). Cf. Article 195 *Code de procédure pénale*, which allows the *Procureur-Général* to ask the *Chambre d'accusation* to change a designation which he considers erroneous.

135. *Id.* C.f. Cr 17 mai 1977 JCP.1978.II.18869, note Bouzat (Marquet); Cour d'appel de Reims 9 novembre 1978, S.1979.92, note Pradel; JCP.1979.II.19046, note Bouzat.

136. Cr 7 juin 1961 B.C. no.290; RSC 1962, 98, obs. Hugueney. See also the cases cited by Levasseur, RSC 1976 969, 970.

137. Cr 29 novembre 1972 B.C. no.368, RSC 1973 408, obs. Levasseur; Cr 24 février 1976 B.C. no.69, RSC 1976 969, obs. Levasseur; c.f. Cr 2 avril 1979 B.C. no.13 (Dor), also Cr 17 mai 1977 JCP.1978.18869, note Bouzat (Marquet).

138. *Communication de M. le Président Rolland*, XIV^e journées franco-belgo-luxembourgeoises de science pénale, Pau, 1974, p.4.

139. Hugueney, L., RSC 1953, 308; Hugueney, L., RSC 1962, 98; Levasseur, G., RSC 1967 659, 660; Levasseur, G., RSC 1973 408.
140. L.79-93.403: "Attendu qu'en statuant ainsi, la Cour qui a nécessairement écarté pour les faits qui lui étaient soumis tout autre qualification et notamment celle d'homicide involontaire, ne saurait encourir le grief d'avoir omis de statuer sur un chef d'inculpation allégué au moyen..." The Court in fact finally declared the *pourvoi* inadmissible, which rendered the statement somewhat unnecessary, though perhaps all the more telling for it.
141. Cr 31 janvier 1974 G.P.1974.1.278.
142. See e.g. Puech, *Les Grands Arrêts de la Jurisprudence Criminelle*, supra, p.279.
143. *Id.* (referring to Gosse): "En présence de certaines circonstances de fait que la pratique révélera tôt ou tard, il ne serait pas surprenant qu'on en vienne à appeler un chien un chat pour ne pas avoir à consacrer une solution contraire à toute équité. N'est-ce pas pour permettre à un gendarme de bénéficier de la légitime défense que la Chambre criminelle a cassé l'arrêt de la Chambre d'accusation de Douai qui avait retenu contre lui un homicide involontaire ... ?"
144. Delmas-St. Hilaire, J.-P., *Jurisclasser Pénal*, *Faits Justificatifs* no.94.
145. C.f. MacKenzie v H.M.A. (1982) SCC 499, *infra*.
146. C.f. Cr 22 mars 1983 L.83-90.217 (Bourlier): "Mais attendu qu'en statuant ainsi, la Chambre d'accusation n'a pas justifié sa décision; qu'en effet, après avoir constaté que l'inculpé avait tiré volontairement, elle ne pouvait s'abstenir de répondre aux conclusions du mémoire régulièrement produit soutenant que les coups et blessures étaient commandés par la nécessité actuelle de la légitime défense de soi-même ou d'autrui..." (emphasis added)
147. See for example, R v McInnes (1971) 3 All ER 295.
148. (1877) 14 Cox 1, at 2.
149. (1954) IR 12, *supra*.
150. (1982) SCCR 499.
151. *Ibid.*, per the Lord Justice-Clerk at 502, and Lords Avonside and Robertson at 506. C.f. La Fond, J.Q.: *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 1983 University of Puget Sound Law Review 237, 272-3: "At its core, the claim of self-defense is a claim that, under the circumstances as the defendant perceived them, his use of force (deadly or non-deadly) was deliberate and appropriate. It strains both the credulity of factfinders and the theory of self-defense to rest the justification of self-defense on accident." (original emphasis).
152. L.81-91.733.

153. L.77-92.217

154. It is to be noted that military courts in peacetime were abolished by virtue of the loi du 21 juillet 1982.

155. GP.1979.655, note P-L.G.; D.1981.462, note Bernardini.

156. C.f. La Fond, J.Q.: *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, *supra*, at 273, fn.178: "It may be that a victim can shoot reflexively and still be acting in self-defense."

157. For an opposing view, see Bernardini, R., note to Nancy 9 mars 1979 (Bastien) D.1981.462, especially at 465 et seq.

158. It is therefore surprising that the latest Model Penal Code creates no special provision to cover such an eventuality. See *Avant-Projet de Code Pénal*, Ministère de la Justice, Juin 1983.

159. The precise operation and effect of a finding of *circonstances atténuantes* are somewhat complicated. For a description of the history and details of this partial excuse, see Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, pp.545-554.

CHAPTER 4

**PRIVATE DEFENCE
AND
THE DEFENCE OF PROPERTY**

1. Introduction

Hitherto, we have examined the right of private defence as a means of preserving one's personal, physical integrity from unlawful invasion. It has, however, long been a subject of debate whether - and if so, to what extent - such privilege extends to resisting attacks directed not against one's person but one's property. Given the law's relative reluctance to admit readily a plea of defence of person one would imagine the criteria to be even more rigorously set when at stake is a merely proprietary interest. And this is largely the position in most, if not all, jurisdictions today.

Such defensive situations highlight particularly keenly the balancing process between the interests both of individuals and of society as a whole. Against the compelling interest in the enjoyment of property and its comforts, and the general interest in repelling unlawful aggression one has to weigh the personal and societal implications of inflicting injury, or even death, upon someone whose prime target was property, not person, and not unreasonably one may conclude that property interests are *prima facie* less deserving of protection than others. ¹

However, as we shall see, it would be a very bold commentator who purported to expound and declare succinctly the principles applicable on authority in this field, for the subject is characterised primarily by bewildering vagueness and ambiguity, rendering most hazardous the identification of clear rules of law. The principle² reason is that attacks on property are very frequently associated, simultaneously or sequentially, with danger of some sort directed against the person - robbery being probably the classic example. ² But in addition one may identify as contributory factors the overlap with the relevant powers in prevention of crime, and of arrest; confusion between the existence of a right of private defence and the limits imposed upon that right; variations in the forms that property may take; and a regrettable reluctance by both courts and commentators to commit themselves openly one way or another on the issues. Of interest, though, is the fact that the difficulties of drafting or of interpretation are nothing new, having long confronted lawyers in the past,

with the same vigorous intractability which judges, legislators and academics have to face today.

2. Ancient Law

Greek, Judaic and Roman law all dealt in one way or another with the use of force in relation to the protection of property. In Athens, if a thief ³ was caught *in flagrante* at night, it was lawful to kill him. ⁴ Biblical law, setting a precedent taken up later by numerous lawmakers through the centuries, distinguished between the thief found by night and one discovered in daytime; it being possible to kill the former with impunity. ⁵ This distinction appeared also in the Law of the Twelve Tables, which permitted the killing to take place either for nocturnal theft; or by day when the thief put up armed resistance. ⁶

The reasons for this distinction, still relevant today, have been hotly disputed, but those advanced include the difficulty of determining the intruder's intentions, with the presumption being that he came to kill or maim; ⁷ the near-impossibility of recovering any stolen effects in the darkness; ⁸ and an implied prohibition of killing in defence of mere property. ⁹ In the writer's opinion, the texts allow us so far only to state that there existed regarding night-time some sort of irrebuttable presumption - but one cannot confidently declare the underlying basis of this rule. However, it is not unreasonable to think that the right could be viewed less as a means solely of private defence in strict terms, than a method by which the owner could visit upon intruders summary punishment, this deterrent reinforcing the general sanctity of the dwelling, and asserting society's condemnation of such an atrocious crime as the invasion of the inner sanctum under cover of darkness.

Whatever the position, the Twelve Tables rule underwent some modification with the subsequent addition firstly, of an obligation on the part of the defender to cry out loud, presumably to efface the suspicion of a clandestine killing; ¹⁰ and later, according to Ulpian, the restriction of the right to kill, in that it could only be exercised when there was no other way of sparing the thief without risk to one's own life. ¹¹ Thus the old

absolute rule appears to have been somewhat restricted later on, so that one might affirm that it did not (any longer ?) permit homicide for the mere defence of property - with the apparent establishment of a rebuttable presumption of danger to the property-owner. ¹² It remains open to conjecture whether the qualifications amounted to a necessary clarification of the law, or an even more compelling reform of the original principle. ¹³ But what is highly significant is the appearance, at so early a stage in the history of lawmaking, of this tension or ambiguity between property defence and self-defence, especially within the context of aggressions occurring at night.

The French Ancien Droit

The Ancien Droit experienced the same interpretative problems so much associated with the old sources, partly because the sixteenth and seventeenth century writers, whose assertions were part of the European discussion on the *jus commune*, relied heavily upon the ancient texts in expounding the law; and thus opinion was divided on the issue of property defence. ¹⁴ Insofar as we are discussing homicide, of those who rejected the defence of property, the most notable authority was Muyart de Vouglans who, leaning upon canonical sources, declared private defence to be limited strictly ^{to} of the repelling of attacks against one's person. ¹⁵ He did allow the slaying of a person found by night in one's chambers, but was quick to point out that this was due to the legal presumption that the intruder would kill anyone who would resist him. Interestingly, though, there is no clue as to how rigid this presumption was. ¹⁶

Jousse on the other hand did not share his indulgence towards thieves, and went so far as to permit the use of 'ruse' and snares in order to take them by night. ¹⁷ He did however retain the night and day distinction, but clearly declared it licit to kill even during the day either where the thief put up armed resistance, or where there was no other way of saving or recovering the effects ¹⁸ (although it was stated that the goods had to be of some value). ¹⁹ In an apparent relaxation of earlier Roman law there is no reference to personal danger by night, although he does retain the rule regarding crying out and states that the killing must be absolutely

necessary. ²⁰ His views were generally echoed by Guy du Rousseaud de la Combe, although the latter's writings exhibit some of the most manifest examples of ambiguity and self-contradiction in the law, ²¹ and invite great caution in making any final evaluation of its actual state.

In light of this, one may state that seventeenth century authority was divided on the matter, with two major authorities rejecting the principle, while two others favoured it; only one of the latter, however, declared the right to kill in its most unadulterated form, and there is strong reason for arguing that, aside from the night-time situation, the right to kill in defence of property rested largely upon the existence of a threat to the person as a means of gaining possession of the rightful owner's goods. ²²

Seen this way, however, the right of property defence appears more as a right to resist a robbery, rather than any pure right of protection of property as such, but an accurate interpretation of the relevant texts is hampered by the fact that, unlike in English, the distinction in French between a "robber" and a "thief" is not always immediately evident, the same word ("voleur") often being used to describe either. Nevertheless, from the above sources one principle is apparent; that attacks directed against dwellings, and particularly those which occurred at night, operated to accord the owner ²³ a significantly wider right of resistance than that which he enjoyed during the day. It is convenient, then, to see how the general principle of dwelling defence has developed in the various jurisdictions since then.

I DWELLING DEFENCE

The dwelling rightly occupies a special place within the law of private defence. Creatures of all kinds have taken to constructing homes not only as a haven for raising their young, but also to protect themselves and their offspring from both the elements and unwanted intruders. Far from being an exception, Man may well be said to have developed this practice to its most sophisticated level.

It is obvious already, that the notion of dwelling defence encompasses a strong element of (potential) danger to the occupants, and this must be borne in mind throughout the following sections. To treat it merely in terms of property and nothing else is surely to misunderstand the precise nature of the habitation; ²⁴ the assimilation of an invasion of one's dwelling with an assault upon one's person is not uncommonly found, ²⁵ and on reflection is not unreasonable. Nonetheless, given the grey area which does exist between the two concepts, one should be aware of the danger that 'extensions' to justifiable defensive force properly belonging to the former (for these do exist) might be casually permitted to wander into the realm of the defence of other types of property. ²⁶

1. England and Scotland

The origin of the phrase "an Englishman's house is his castle" is to be found in Semayne's case, ²⁷ but the inference one might possibly draw that the English common law granted occupants complete licence to repel by whatever means any intruder would be quite erroneous. As was stated more eloquently by one American justice,

"...The regal aphorism that a man's house is his castle has obscured the limitations on the right to preserve one's home as a sanctuary from fear of force or violence." ²⁸

The law in fact has always differentiated between the level of gravity of the 'attack' upon the dwelling, and permitted a response more or less graduated according to the seriousness of the intrusion. ²⁹ It is thus convenient to adopt a similar approach in our examination of the authorities.

A. 'Felonious' Trespass

In speaking of the right to kill in defence of one's dwelling what was in fact of most concern to the institutional writers was a small group of the most serious crimes, and consequently the old distinction was habitually

drawn between felonies and those crimes not amounting to felony. Thus Coke speaks of murder and robbery, ³⁰ echoed by Hawkins, ³¹ while East includes the crime of rape within the chosen category. ³² The line thus seems clearly set between felonies and other offences.

But one is immediately struck by the restrictive nature of the class of offence; indeed its relevance in a discussion of the defence of property seems questionable. Insofar as rape or murder are concerned, whether one speaks of the attack occurring indoors or outside, the distinction appears somewhat redundant. For here we are clearly within the traditional area of self-defence.

In some respects the criticism is valid, especially when one considers that in the early writings, killings in the dwelling to prevent a felony were never really treated separately from self-defence as such, despite promising prefaces implying the contrary. ³³ But in actual fact the distinction was of some importance, in that, firstly, the fact that the killing took place in a dwelling brought it outwith the class of homicide *se defendendo*, ³⁴ and therefore the accused was not only acquitted, but forfeited nothing; ³⁵ and secondly, the circumstances could constitute another exception to the normal rules by releasing the homeowner from the duty to retreat; ³⁶ strong indicators that the law paid a peculiar regard to the plight of the person assailed in his own home.

But even as regards the actual class of offences, there is evidence suggesting that between the writings of Coke and the turn of the eighteenth century, the intervening years had seen some relaxation of the rigours of earlier times. Thus we find the category specifically expanded to include arson, ³⁷ and more significantly, Hawkins speaks of an attempt "to commit...Murder, Robbery or other Felony." ³⁸

Let us first look at robbery and arson. Both offences are strongly associated with threat to property, though the relationship is by no means exclusive of other factors. For, in robbery especially, the requirement of a personal threat brings us again within the category of classical self-defence. It is often argued that this latter aspect is what permits the killing but closer inspection shows this not to be entirely correct. For, in

contrast to the classic requirements of truly life-threatening harm, robbery is less immediate in its violent aspect, and even if the threats are executed, their gravity may be markedly less than that of a truly homicidal attack. The rule relating to arson is possibly the most tantalising example so far. It certainly is one property crime so fearful that its identification knows no legal jurisdictional boundaries.³⁹ The obvious question is whether it is the danger to the house or to those within which underlies the rule. It is difficult to determine the exact reason, but it should be pointed out that no authority specifically requires that the house be inhabited at the time.⁴⁰

In the writer's opinion neither the house seen as property *tout court*, nor any necessarily immediate physical danger to the occupants accurately explains the rule from the point of view of the old authorities. Rather, one should look at the house within its overall context; a habitation the destruction of which would leave its owners devoid of their most important refuge from harm - of all kinds. Presumably it would be too great a hardship to demand that they suffer the loss of their abode and venture into the appalling state of financial, social and physical insecurity which would ensue. X, a penniless wanderer would certainly not be permitted to kill Y, a known local brigand who might conceivably *one day* decide to slit his throat and take away his goods as he slept by the wayside; but on the above interpretation, had he an abode, he might well kill Z, an arsonist who would, by the destruction of his house, consign him to such a potentially dangerous and vulnerable state. Seen this way, it is clearly a very different notion of danger that we are dealing with now, and the extension (some might say "dilution") of the notion of harm is clearly a departure from the rigid notions of classical private-defence.⁴¹

One important case of the nineteenth century illustrates well this peculiar regard of the law for the dwelling, especially at night. In R v Meade & Bell⁴² the defendants were indicted for the murder of one member of a mob which had threatened them. Meade had previously escaped death, in a revenge attack for informing to the police about smuggling activities, and was on that occasion warned by his attackers that they would come at night and "pull his house down". A great number of people did in fact congregate outside his house, indicating, particularly by their

opprobrious language, that they had no peaceable intention. A shot was fired, but the precise moment of this was unsure in court, as was evidence indeed of any demonstrable act of violence by the mob. On such facts, Holroyd, J. understandably charged the jury with some care. But some passages reveal the solicitude of the law in regard to the occupant faced with an apprehension of danger. At one point he said: ⁴³

"...the making of an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault."

Significantly, he later suggested that had the threats previously expressed been reasonably anticipated as imminent in their execution by either of the defendants, then the act of firing the shot might well have been justified. Now, while there was certainly, if the accused's version was believed, the potential for personal physical harm, it is worth noting that Justice Holroyd's words were not as such confined to this eventuality, and the whole tenor of the judgement seems to substantiate the view that outside the cases of mere civil trespass, the consequences in law for the intruder were potentially very serious. ⁴⁴

Two later cases indeed suggest strongly that much of the force of the early law has been retained. There is a telling reference by one judge, in the case of Porritt, ⁴⁵ to the scope of the right of dwelling-defence. There the accused appealed against his conviction for the murder of his step-father, apparently in error as he allegedly fired at one of two men seriously threatening the latter, during an organised gang-attack upon his home. Mr. Justice Ashworth stated: ⁴⁶

"At the trial it was conceded on behalf of the Crown that, if the jury took the view that the firing was done in the honest belief that it was necessary for the protection of his step-father, then the proper verdict was one of Not Guilty, and a similar concession was made in regard to the possibility of an honest belief that it was reasonably necessary to protect the house by shooting."

(emphasis added)

And almost directly in point with Meade & Bell is the case of Ball.⁴⁷ There, the defendant was acquitted on a charge of wounding, where it was shown he had fired at a crowd of people involved in a serious attack upon his house. Here the facts were if anything, even more favourable to the accused than in Meade, for missiles had already been thrown through the windows of his house when he fired, and he also had issued a warning to the attackers. The acquittal, it should be noted, was actually directed by the trial judge

These two cases on their own suggest that some one-and-a-half centuries after Meade, homeowners still have the heavy weight of the law behind them in times of jeopardy

The final major felony not yet mentioned is burglary, or housebreaking, an offence referred to by most of the commentators.⁴⁸ And it is arguably the one example which holds the key to determining the basic attitude of the law in any given jurisdiction to the issue of dwelling-defence.⁴⁹ Significantly, in an evident perpetuation of ancient rules, the important qualification in England was that the offence be committed by night for the wider rules of private-defence to apply, a distinction which prevailed equally north of the border.⁵⁰

Once again, we face the question of the exact basis and meaning of the rule. Why was it that one might kill a robber by day or night, but a burglar only by night? The question itself surely supplies the answer. For especially if we look at it in light of the prevailing attitudes to homicide in general, it is virtually certain that, at least in theory, the basis was the implied threat to occupants.

The reasoning is far from unfounded. Firstly, from the subjective point of view, the occupant has everything to fear from a nocturnal invasion of his dwelling; the invader's intentions will habitually be unknown, leaving the owner to come to his own conclusions in the darkness. Secondly, the likely absence of either succour or witnesses, which provides an inducement to the burglar to perform any acts which he deems 'necessary' in the course

of his operations and getaway, can only heighten this anxiety; his possession of a deadly weapon cannot be ascertained, but may reasonably be feared; ²¹ even without him being armed there is always the potential that the intruder may panic, especially when confronted within the confined space of a dwelling-house; ²² and of course, highly significant was the fact that in previous times, the punishment for such crimes as burglary were severe, and ironically the harshness of the law towards the aggressor heightened indirectly the dangers to those whom it sought to protect, by providing the intruder with every reason for endeavouring to frustrate his discovery or capture at all costs.

Subject to this last qualification, though, it may be observed that the eloquence of Hume is as valid today as when he wrote, remarking of burglary that:

"...this is an enterprise of so bold and so deliberate a nature, and one in which (the burglar) has already so much the advantage, as warrants those within to dread the worst designs, and such as are not to be prevented but by superior force.....for there is always a hazard, less or more, to those within, from an assault which has been carried so far with success." ²³

Note of course the dual aspect to the rule; for the exclusionary nature of the reference to day intruders ought not to divert attention from the fact that one is permitted to kill night burglars.

Having proposed, though, that the right rested largely upon the existence of some threat, one should once more inquire into the nature of the presumption. Caselaw on this precise aspect of dwelling-defence is not abundant, but nonetheless sufficient to detect a certain uniformity of reasoning.

Two early English cases are directly in point. In Levett's case, ²⁴ the accused (who was charged with manslaughter) and his wife were woken by a servant who thought she heard thieves breaking in. He rose to search the house, armed with a sword. The servant had with her a girl she had taken on as a help, without her master's permission and unknown to both him and

his wife, and so she hid her in the buttery. He came across the unknown figure, whereupon,

"...not knowing the said Frances to be there...hastily entered with his drawn rapier, and being in the dark and thrusting with his rapier before him, thrust the said Frances under the left breast giving to her a mortal wound, whereof she instantly died."

He was acquitted of manslaughter, "for he did it ignorantly without intention of hurt to the said Frances." **

In Cooper's case, ** the accused was acquitted of murder, after slaying around 1 a.m. a man who, having issued serious threats against the occupants, broke a window in an apparent attempt to gain entry. The case is interesting for two reasons. Firstly, on the facts it will be noticed that the acquittal was founded on an interpretation somewhat removed from that which normally prevails, even today, in the law of self-defence, notably in respect of the question of imminence. One may justifiably say, then, that Cooper was not so much defending himself (or the woman in whose tavern he was staying), as defending the dwelling from the intrusion of a person who evidently would have proved dangerous once inside. No giving back to the wall here. It seems obvious too that one should not have to wait until the intruder is actually inside, in order to employ defensive force. ** Secondly, the Court, citing the statute of 24 Hen.8 c.5, ** stated that the killing would be considered justifiable if committed against someone entering to kill, or burgle the house; the equation between a murderous attack and a burglarious one is, however, not to be taken as automatic, for some reference to danger is made in the latter case - although it will be appreciated that by night such an attack would almost always imply danger, imminent or otherwise.

A third major case is that of R v Scully, ** where a servant, set to guard at night his master's premises fired at and killed an intruder in the apprehension of being shot at by the latter. Garrow, B. charged the jury as follows:

"...Any person set by his master to watch a garden or yard, is not at all justified in

shooting or injuring in any way, persons who may come into these premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them."

The case is important not for the acquittal as such, which appeared to have proceeded on grounds of pure self-defence, but for the implication that Scully could have shot had the thief (as the deceased turned out to be) been entering the house itself, which accords again with most authorities. ⁶⁰ While it would be most unwise to suggest that there reigned in England an irrebuttable presumption that night-intruders intended to commit murder, and could therefore be slaughtered with impunity, one may safely take it that the courts required strong evidence to overturn the inference that the homeowner faced with a nocturnal intrusion had just cause to fear for his safety. ⁶¹

In the Scottish case of William Williamson, ⁶² the High Court of Justiciary, sitting in Glasgow, saw the acquittal of the owner of a bleachfield who, after several thefts, lay in wait one night and shot dead the culprit in the act of entering one of the out-houses by night through a window. Hume disapproves of it, on the principle that the accused was not acting spontaneously but with calm deliberation; but in the absence of contrary authority it is by no means clear that the case may be properly labelled as a deviation from the jurisprudential norm. ⁶³ The decision does give strong support for the view that householders faced with an unlawful intrusion by night had the law firmly in their favour.

The line drawn between night and day does indicate that the felony/misdemeanour distinction is somewhat incomplete, and indeed Lanham is, it is submitted, largely correct when he argues to this effect, referring to Blackstone's specific exclusion of day burglary from the rules; ⁶⁴ but one should be acutely aware of the dangers inherent in too strict a reading of this argument. Clearly in the case of an attempted robbery or murder, the time of the attack is irrelevant; equally though, one should not be induced to treat the rule regarding burglary as prohibiting, as such, deadly force against burglars operating by day. Each case will obviously depend on its own facts and merits, and we are grateful to Hume for pointing out the possible risk of misinterpreting the scope of the rule, and for providing us

with an interpretation of the law more logical and socially effective in its application. ⁶⁶

For example, let us imagine that, walking home at midday from outlying fields, I see a person attempting to enter the farmhouse in which there happens to be (a) the family silver, (b) my wife, a woman of rather nervous disposition, and (c) asleep in bed in the room by which he is entering, my attractive seventeen-year-old daughter, recovering from illness. From what I can gather, his *prime* intention is only to steal. But am I really to be expected without exception to rest the life and honour of my family on a supposition such as this and a hopeful assessment of either the intruder's imperturbability or moral rectitude? It is submitted that the use of immediate deadly force in these circumstances cannot *a priori* be ruled out. ⁶⁶

Generally though, it is wise to bear in mind Blackstone's declaration, and it will be appreciated that the authorities North and South of the border often refer to "*forcible and atrocious felonies*" ⁶⁷ or employ other such expressions. ⁶⁸ The various terms are merely different ways of indicating that it was the more serious crimes that would permit the use of deadly force in defence - a qualification all the more pressing since what is at issue were those attacks gave rise to a significant relaxation of the normal rules of self-defence, although it has to be said there still remains the problem of determining where "*forcible atrocious felonies*" ended and where *mere* felonies and misdemeanours began.

Of course, the felony/misdemeanour distinction was abandoned in England in 1967, ⁶⁹ but there is, it is submitted, no reason to suppose that there has been a substantial modification of the old rules. There is little modern caselaw on which to proceed, but what decisions there are do seem to indicate that although we may no longer have the same power of summary execution at our disposal, a power which arguably existed in ancient times, the home-dweller in England still enjoys the right to employ great force in the case of an intrusion or attempted intrusion which in olden days would have been classed as a serious felony; as one English judge, in an extrajudicial statement, declared recently, "*houseburglary is a very serious intrusion into a place which should be sacred from such activities*". ⁷⁰

We have mentioned the case of Porritt, ⁷¹ decided before the felony/misdemeanour distinction was abandoned of course, but it remains vitally important, with its suggestion that the law had changed little since earlier times. But even more dramatic is the case of Ball, ⁷² and likewise in Frankum ⁷³ the home-dweller's right was affirmed most tellingly. There the deceased, in a state of inebriation, attempted to gain entry around 11 p.m. into the accused's house, through a bathroom window. To prevent this, the accused had apparently thrust an ornamental cavalry sword through the shattered glass, stabbing the intruder fatally in the chest. After defence submissions that there was no case to answer, once again the trial judge directed an acquittal.

So far as Scotland is concerned the state of the present law is difficult to determine, given the lack of caselaw on the matter. However, in Crawford v H.M.A., ⁷⁴ Lord Keith referred to self-defence against a housebreaker as being justified, and the writer would submit that it is probable, at least so far as nocturnal intrusions are concerned, that the principle still stands in our modern law. With respect to Professor Gordon, the writer would further suggest that his apparent rejection of the words of Lord Keith appears to be based on a misapprehension as to the basis of the housebreaker rule. As the above analysis has attempted to show, the rigour of the law in relation to nocturnal intruders did not as such rest upon the risk of patrimonial loss which the latter presented. Rather, it was the far greater fear engendered by such an intrusion, and the difficulties it posed to defenders in making a correct assessment of the situation, which provided the main rationale; and so one would respectfully question Gordon's reply that *"it is unlikely that homicide in defence of property would be considered justifiable in modern times..."*, ⁷⁵ for it fails to meet the point.

On the other hand, whatever the principle, it could be expected that given especially the rather restrictive approach of modern Scots law on self-defence, certainly in relation to homicide, the courts would be more rigorous in their examination of any case in which such a defence was raised, and therefore it seems likely that the practical effect is to ensure an operation of the law less favourable to, and more constrictive of, the householder than that which prevails South of the border, a situation which the writer finds of much regret.

Definition of Dwelling

Having established that one may use deadly force in certain circumstances in defence of one's dwelling, an important issue bearing greatly upon the scope of the right is the precise definition given to the term. One can probably readily accept the idea of a caravan coming within the definition, but what of, say, a tent ?

In England the case of *R v Ford* ⁷⁶ appears to have established that one could kill in defence of a room in a tavern, and *a fortiori* it should apply to a rented apartment, ⁷⁷ but interesting enough is the assertion in *R v Scully* that the mere fact that the intruders were breaking over the garden wall would not in itself justify the use of deadly force, nor would this even apply if the raider entered a chicken-coop. ⁷⁸ Hume states that *"...it is sufficient that he has entered the house or has broke the safeguard of the building."* ⁷⁹ It is not clear what is precisely meant by this last expression, but probably he means it to exclude the killing of someone who has merely, say, breached the walls of the property. It will be noted however that any doubts he entertained as to the decision in *William Williamson* ⁸⁰ lay not in the fact that the building was an outhouse, but in the element of premeditation - but where these buildings are merely for the storage of property, then their inclusion is surely open to question.

Of interest at this point is the position adopted by the American courts. There, the relevant notion of "curtilage" ⁸¹ encompasses the limits of the dwelling and the customary outbuildings, ⁸² but the deadly force protective right does not extend to the actual ground upon which the buildings stand, ⁸³ the theory behind this apparently being that the 'castle doctrine' is based not on the dwelling seen as mere property, but as a place of refuge. However, while arguably a motor-car ⁸⁴ or a tent are acceptable extensions, the inclusion (in America) of goose-houses ⁸⁵ and the like seems to stand in direct defiance of the principle of proportion, and we are arguably getting dangerously close to the justification of general deadly force in defence of mere property which, as we shall see later, is subject to far more stringent conditions. ⁸⁶

The one major addition in the United States has been the extension of the right to include property such as a store, an office or other business-place; ²⁷ however, in one important case ²⁸ the opposite view was taken, it being held that a place of business, even where used for sleeping, could not be defended as a dwelling. While this latter decision may seem rather over-restrictive, one may well question the general application of the principle of dwelling-defence to the protection of one's place of work. ²⁹ We seem once again to be entering a grey area where self-defence and the defence of property are heavily intertwined - and this ambiguity is arguably to be found in our own law.

Such an impression seems to receive justification in the recent decision of the House of Lords in Attorney-General's Reference (No. 2 of 1983). ³⁰ The defendant was charged with a variety of offences after having prepared petrol bombs one night to protect his shop during two days of serious rioting in July, 1981. The Court of Appeal decision has aroused much interest but, it is submitted, some observers have failed to appreciate the importance of its declaration that such (potentially deadly) weapons could conceivably be used in defence of his property. ³¹ Leaving us to speculate that the use of deadly force to protect property may indeed be justified in English law, the decision appears to adopt the American view on the defence of one's place of business. It is difficult then not to feel that in some senses arguments as to the dwelling-defence rules resting solely upon the habitation as one's own personal haven from harm of all sorts, ring somewhat empty, ³² and that we are witnessing, at least so far as constructions which may be assimilated to dwelling-houses are concerned, a relaxation of the personal danger requirement. It may just be however that the implications of the decision may not be as wide-reaching as one might initially suspect, and this will be examined later on when we look at the use of force purely in the defence of property as such.

One final situation often accorded separate treatment is that where someone seeks forcibly to dispossess the occupant from his dwelling. The castle doctrine received full approbation in the famous case of R v Hussey ³³ where the Court of Appeal took it that deadly force could even be exercised by a tenant facing unlawful eviction by his landlady. The case has been the subject of much criticism ³⁴ but as Professor Williams points

out, if the doctrine of precedent still has force it remains the law. 96 One would prefer to dwell however upon Williams's cautionary advice that no-one would be well-advised to act on the assumption that Hussey would now be followed 96 and certainly it is unimaginable that such a decision would have occurred or would occur today in Scotland.

The underlying principle it seems, is sound (especially given the interest of society in general), that a man should not be so easily deprived of his home sanctuary by a decree of the jungle; a sanctuary so revered that even officers of the law may not enter it at will against the owner's wishes except under the most compelling circumstances. Thus, where no claim of right is involved, it is submitted that deadly force may legitimately be employed against a trespasser attempting dispossession, and the view proffered by Williams is arguably to be preferred against Lanham's stance on the matter. 97

B. 'Non-Felonious' Trespass

In keeping with the view that the right of riposte should be graduated according to the severity of the attack, the law places greater restrictions on the use of defensive force where the less serious forms of intrusion are concerned, with both necessity and proportion held in close scrutiny. The case of Captain Moir 98 is the classic illustration of this, where a landowner, exasperated by persistent trespassing upon his land, eventually after repeated warnings to intruders shot in the arm a young man caught on his property. The latter unexpectedly died from the wound and Moir was subsequently hanged for his murder - a salutary warning to those who would hold that necessity alone will suffice to found a good plea of private defence. 99

It will be noted that two circumstances surrounding the incident were fatal to Captain Moir; his victim was only upon his land; 100 and he was but a mere trespasser. The decision is a powerful, albeit somewhat unfortunate, illustration of the state of English law, for it may generally be said that one may never kill to prevent or terminate a mere trespass. 101 We have a clear indication that notions of proportion here take precedence over any

'castle doctrine' which, taken to its extreme is simply a euphemistic term for private defence under the rule of autonomy, this latter viewing private defence as resting merely on the necessity requirement.

Thus, Hawkins states that *"...he that kills another...that persists in breaking his hedges after he is forbidden, is guilty of manslaughter."*¹⁰² It may perhaps be possible then to distinguish *Moir* on the grounds of the premeditated nature of the riposte; but if so, it is not exactly clear into which category Hawkins would put the riposte he mentions here - neither excessive defence ¹⁰³ nor provocation seems to be appropriate, although perhaps some hybrid form of the latter is envisaged.

Interestingly enough, though, North of the Border Hume appears to have taken a slightly more lenient view of the actions of the property-owner in such circumstances, merely doubting whether such a killing would be excusable, ¹⁰⁴ and it is submitted that it is by no means clear that in Scotland the killing of a persistent trespasser would necessarily have been murder, although this would virtually certainly be the case today. ¹⁰⁵ Furthermore, even within the dwelling the mere fact that someone is a trespasser does not justify killing him. ¹⁰⁶

The general rule is stated by Stephen: *"(the owner) may put a trespasser out of his house or out of his field by force, but he may not strike him, still less may he shoot or stab him."*¹⁰⁷ Initially then, merely ushering, rather, or firmly leading the person off his property - *mollitur manus imposuit*. ¹⁰⁸ In effect nowadays, one may speak simply of "reasonable force" ¹⁰⁹. *A fortiori* one may not beat him in anger or revenge for not leaving. ¹¹⁰ Thus, *"a kick is not a justifiable mode of turning a man out of your house"*, ¹¹¹ but if death should accidentally (and unforeseeably) arise out of a reasonable use of force, the owner will not be liable. ¹¹² However, if the trespasser resists, then the normal rules of self-defence will come into play, and if in an effort to stay the intruder uses such force as to endanger life or limb then obviously deadly force may, if necessary, be used. ¹¹³

The question of whether one must first request the trespasser to leave or desist has been the subject of much debate. Arguably, if one does not

make such a request then any subsequent use of force fails the necessity requirement, as for all one knows this might have sufficed; and there are good reasons for requiring such a move, given especially the potential for escalation in violence. '14 However, one must distinguish between the forms of trespass; if it is a mere peaceable trespass then the common law rule which still applies is that one must first request desistance '15 and this is also applicable to invasions upon land. It is of course of little practical and legal value if the trespasser is not given a reasonably sufficient time to comply with the request. '16

If he refuses to move, reasonable force may then be used, and if he resists then the normal rules of self-defence will come into play, but the fact of request will not act as a permit for the occupier to use such force as he sees fit, and the normal constraints of private defence still apply. '17 The rule is, though, wisely subject to qualifications, such as where a request would be useless, or would fail to protect property from substantial harm, '18 but the one major exception relates to trespasses which are effectuated in a forcible manner. There is a long line of authority that one may immediately take action against forcible trespassers without a prior request, '19 a wise rule, given the keen interest a possessor has in limiting the destruction of his property, or even more compellingly, in preventing the continuation of any forcible intrusion into his house, the eventual consequences of which he may only guess.

And, as has been remarked elsewhere '20 the true problem area is that of a forcible trespass, yet one which as such does not immediately create any reasonable apprehension of harm on the part of the occupants. We have here a conflict between the normal rules of private defence which would hold deadly force, even where necessary, to be disproportionate, and the general interest in protecting one's domicile from invasion, a difficult area, as we are on the borderline between the graver offences involving the dwelling, and mere trespass *tout court*. In a country where one might kill to avoid unlawful eviction one might expect the law to favour necessary deadly force, but it seems that ironically the land of castles has generally taken a stricter view of the use of deadly force in such circumstances than its American counterpart; and probably killing to prevent forcible entry as such is not justifiable under English law, '21 although there must remain some

doubt on the matter, ¹²² especially in light of Hussey. Due to the likelihood of escalation on both sides, the situation is likely to present itself rather infrequently but the writer sees no reason for not casting a special protection around the homeowner in such circumstances, and prefers the view taken some thirty-five years ago by an Illinois court:

"We think it may safely be laid down...that a man's habitation is one place where he may rest secure in the knowledge that he will not be disturbed by persons coming within, without proper invitation or warrant, and that he may use all of the force apparently necessary to repel any invasion of his house." ¹²³

It must be stressed that this rule is tempered by its inevitable subjection to the requirement of necessity, but one may conceive of cases where such situations could arise. The writer, though, has no wish to camouflage the fact that he supports what is in effect a qualification of the normal principles of self-defence, but would argue that the interest in maintaining one place as totally secure from violence against one's person, given especially the potential trap which a dwelling may constitute, is compelling enough to warrant this relaxation, which both protects the dweller, and reaffirms society's condemnation of the violation of the domicile. ¹²⁴

2. France

Turning to France, article 329(1) of the *Code pénal* conveniently created a specific clause referring to the dwelling, stating that included within the concept of private defence are homicide or other violence employed by night against intruders attempting to breach the house's immediate and outer defences. ¹²⁵ The question was, what reasoning lay behind the inclusion of the article as a separate element of the law of private defence ?

One hypothesis favoured by several writers, ¹²⁶ relying partly upon a report of the pre-enactment legislative debates, ¹²⁷ was that the provision merely gave, along with subsection two, examples of private defence - no

more, no less. On this interpretation, the full circumstances relevant to make out a successful plea of private defence would have to be proved individually by the accused as with any other case. But the enumeration of mere examples of the law is hardly of common usage, and the notion that the legislators departed from normal practice and chose to devote an entire article to illustrations of the law merely for the convenience of the judiciary seems too unlikely to be retained. ¹²⁸

Another theory proposed was that Article 329 (1) and (2) provided the source of a plea of defence of property, but this is immediately open to objection, firstly in that it would restrict the notion to two very specific cases, ¹²⁹ and secondly in that it is obvious that the clause was intended to protect the dwelling seen as an extension of the person, and thus to ensure his physical safety. ¹³⁰ As a result a third theory came generally to be favoured by doctrinal writers - that in order to enhance the security of those inside dwelling-houses, there existed in certain circumstances a *presumption* that the acts of the defender were committed in legitimate defence. Consequently, it would be sufficient for the accused to show that the basic elements specified in the article were satisfied (night-time, breaking in etc.) for an acquittal to follow. ¹³¹

However, this did not dispose of the matter, for it immediately raised the question of the precise nature of the presumption. Could it be overturned by proof to the contrary offered by the prosecution, proof that the accused was not in any real danger at the time, and knew this to be so? Some writers argued that the presumption was irrebuttable, others holding that evidence in rebuttal could be evinced - and these hesitations and contradictions were reflected in the position adopted by the courts in a series of important decisions, until one hundred and forty-nine years later the matter was eventually, if not entirely satisfactorily, put to rest.

A. Caselaw before 1959

Two early decisions both concerned individuals whose violence was prompted by the infidelity of their spouses. In the Braquet case ¹³² the accused, in order to confirm his suspicions, returned prematurely and surreptitiously to

his property and stabbed his rival in the chest as the latter arrived for a nocturnal rendezvous, while in Casabonne ¹³³ the victim, despite previous promises to desist in his amorous enterprises, died of several knife-wounds inflicted within the owner's grounds; in both cases the *Chambre d'accusation* delivered a *non-lieu* and the *Cour de cassation* summarily dismissed the appeals. Of particular interest in one of the cases is the express and astonishing avowal of the fact that the intruder's true intentions were known was irrelevant. ¹³⁴

From a slightly different angle was approached the celebrated case of Madame de Jeufosse. ¹³⁵ There, as the victim - a village local - placed love letters beneath a tree on private property, he was shot dead on the express orders of the mistress of the house, who wished to protect her daughter from his philandering instincts. Soon after this case, there followed another killing in very similar circumstances ¹³⁶ - and one cannot rule out the suspicion that a 'copy-cat' effect, resulting from the favourable disposal of the first case, was at play. The distinctive feature is not that the accused in both cases were subsequently acquitted, but the fact that they were committed for trial at all, indicating that the *Chambre d'accusation* did not view the presumption as impervious to rebuttal. ¹³⁷ Nevertheless, the final jury verdicts, in the result, merely served to perpetuate the rigidity of the presumption, and no doubt acted to discourage those who viewed it as open to rebuttal.

The turn of the century really marked the first major signs of cracks in the solidity of the rule. In the celebrated de Frayville case, a poacher, known to be such by the property-owner, and of the most exasperatingly audacious kind, ¹³⁸ filed a civil claim for the loss of a leg mutilated by a spring-gun set by the latter, after criminal proceedings against the owner resulted in a *non-lieu*. The lower court, despite the basic elements of the article being made out ¹³⁹ found for the plaintiff, implicitly rejecting the application of the presumption of article 329(1), on the grounds that the owner knew he was in no personal danger.

However, the boldness of its venture was quickly repudiated on appeal, ¹⁴⁰ and this latter judgement was confirmed in a landmark decision of the *Chambre de requêtes de la Cour de cassation*. ¹⁴¹ It should be

pointed out however that the interpretation of the *Chambre de requêtes* decision as based solely on article 329(1) is not entirely free of doubt, ¹⁴² but it may nonetheless be seen as a salutary warning that deviations from the normal rule would not be tolerated, ¹⁴³ and it does appear to have proceeded on the basis that once its basic elements were made out, then the protection offered by article 329(1) was absolute, thus reasserting that the old rule was still very much alive.

Yet within thirty years dissent was making itself more effectively heard, and in a series of decisions ¹⁴⁴ various lower courts opted expressly or otherwise for the alternative explanation of article 329(1), culminating in the rejection of an appeal by a man who, being of a rather nervous disposition, one night shot at a group of youngsters calling in vain below his daughter's bedroom, and who not only were merely boisterous but furthermore were in the process of leaving the property when the shots were fired. ¹⁴⁵ In a decision truly remarkable, incidentally, for its double display of judicial precocity, ¹⁴⁶ the *Tribunal correctionnel de Mayenne*, referring to the "rebuttable" nature of Article 329 almost as an after-thought, upheld his conviction for involuntary wounding. ¹⁴⁷

But it was not until 1959 that the principle espoused by these courts received the full approbation of the *Cour de cassation*, sitting under the Presidency of the legendary Judge Patin, thus completing the break with the spirit of *Braquet* and *Casabonne*, in possibly the most significant French decision on private defence of the twentieth century - the *Reminiac* case. ¹⁴⁸ The facts were as follows:

B. The Arrêt Reminiac

A certain Tison came to visit the accused's maid, whose lover he had once been, and whom he still saw now and then; he was however refused entry due to his drunken state. He consequently tried - in vain - to force his way in, against the exhortations of the appellant, who eventually went off to get his revolver, and from an upstairs window fired twice at the spot where he supposed Tison (who had given no sign of himself for a while) to be situated. Tison, who was in fact standing behind some bushes smoking a cigarette was seriously injured by the shots. On Reminiac's *pourvoi* to the

Cour de cassation from the decision of the Cour d'appel de Bourges convicting him of voluntary wounding, the Court in very forthright terms laid, *inter alia*, Braquet and Casabonne to rest, declaring that far from being irrefutable, the presumption (since presumption it was) was open to rebuttal and could not be interpreted as justifying acts committed outwith the limits of actual necessity in face of grave and imminent danger to persons or property:

"...- Attendu qu'en l'état des faits constatés, la cour d'appel a pu, sans violer les articles 328 et 329 du code pénal, refuser d'en faire application en l'espèce; que si, il est vrai, le premier paragraphe de l'article 329 dont le prévenu réclamait le bénéfice, déclare légitimes le meurtre commis, les blessures faites ou les coups portés pour repousser de nuit l'escalade ou l'effraction des murs et clôtures des maisons habitées ou de leurs dépendances, il s'agit là d'une présomption légale qui, loin de présenter un caractère absolu et irréfragable, est susceptible de céder devant la preuve contraire; que le texte dont il s'agit ne saurait justifier des actes de violence lorsqu'il est démontré qu'ils ont été commis en dehors d'un cas de nécessité actuelle et en l'absence d'un danger grave et imminent dont le propriétaire ou les habitants de la maison aient pu se croire menacés dans leurs personnes ou dans leurs biens." 149

C. After Reminiac

The interpretation of article 329(1) as raising only a rebuttable presumption of self-defence is now almost unanimously accepted in doctrine. However, the Reminiac decision has ever since its delivery been vigorously, if respectfully, contested by one eminent commentator. Doyen Bouzat has consistently argued for the retention of the old rule, maintaining that the decision has thwarted the true aim of the law, namely to ensure effectively the security of people in their houses at night. 150 And one cannot but agree that an irrebuttable presumption would theroretically be ideal, and would enhance the protection of the citizenry. 151 Some support for this view is further to be found in article 322 of the Code pénal which allows

only for a qualified excuse of provocation where the intrusion occurred by day. ¹⁵²

But while in principle a strong case may be made for the above view, the practical consequences of such an approach are so socially harmful as to render most compelling a reconsideration of the rule. For the price it exacts is a hefty one. A system which would permit jealous husbands or timorous householders to ambush or otherwise kill or maim any night-time intruder would constitute a blatant usurpation of the natural right of self-defence. While *"the right of self-defence...is founded in the law of nature, and is not, nor can be, superseded by any law of society."* ¹⁵³ it is nevertheless submitted that the privilege may not be extended by positive law so as to permit or institutionalise an abuse of the law so repugnant to the standards upon which civilised human behaviour is based.

The view typified, *inter alia*, by the Braquet decision then, has been roundly criticised by the majority of writers, being dubbed a *"permis légal de tuer"*. ¹⁵⁴ And as has been pointed out elsewhere, does not the victim-turned-accused in such cases himself display a highly anti-social and nefarious character through his actions ? ¹⁵⁵ It does seem unlikely that the legislature would itself pass an enactment so vulnerable to serious abuse, and reading some judgements, one cannot help feeling that some nineteenth century courts, aware of the implications of their holdings, imported seemingly arbitrary references to personal danger in an attempt to add respectability to their decisions. ¹⁵⁶

Reminiac still stands. However, over the past quarter century we have witnessed increased questioning of the decision by many writers, along the lines of Doyen Bouzat's objection - that much, if not all, ¹⁵⁷ of the utility of article 329(1) was lost with the introduction of the Reminiac doctrine into the law. Where they differed from Professeur Bouzat was on the alternative they proposed.

But is even this criticism justified ? It has been observed that very often the facts in a case will be so overwhelming one way or another that the question of proof will hardly be at issue ¹⁵⁸ - although it will of course be appreciated that this comes from a commentator within the French

legal tradition, which does not share to the same extent our preoccupation with rigorous rules of procedure and proof. And since in any case, on an application of the law based solely on Article 328, the circumstances of a night intrusion would weigh heavily in favour of the homeowner, is not Article 329 reduced merely to stating the obvious ? Let us look again at the post-1959 implications of the Reminiac case. Speaking several years before the decision, Garçon explained the concept of the rebuttable rule thus:

"Lorsqu'il est démontré que le crime a été commis dans les conditions prévues par l'article 329, l'accusé n'a rien à prouver, il est justifié. Cette justification cesserait seulement si le ministère public démontrait de la façon la plus claire qu'il n'était pas en état de légitime défense. Mais le juge se conformera à l'esprit de la loi en se montrant très sévère pour admettre la culpabilité. Il suffira que le meurtrier ait pu ignorer les intentions de celui qui violait son domicile, qu'il ait pu concevoir la moindre crainte touchant sa sûreté personnelle, pour qu'il soit couvert par la présomption de la loi." 159

(All emphases added)

Such is the interpretation of the operation of article 329(1) which would thoroughly commend itself to the present writer. However, a careful reading of the judgement in Reminiac will reveal that the *Cour de cassation* did not go so far as to espouse completely this view, and one may justifiably regret that the Court did not express itself in equally unambiguous terms. There is though some earlier caselaw to support Garçon, 160 and it is unfortunate that the Court, in its commendable endeavour to counter the abuses of the past, arguably failed to guarantee sufficiently, as the Garçon's view does, the rights of those persons truly deserving of the full protection of the law in certain situations of grave danger.

It should finally be pointed out that in relation to the crime of arson, although there appears to be no recent authority in point, the opinion of Garçon is that homicide would where necessary be justifiable in its prevention. He furthermore specifically states that this could be so even if no human life were in peril, a view with which the writer fully agrees. 161

D. The Rehabilitation of Article 329(1) ?

The renewed interest in article 329(1) owes much to the efforts of Professor Savey-Casard. Soon after the Raminac decision he published an article providing a totally different slant to the question.¹⁶² His approach was to stress the separation between the question of the existence of a threat or intrusion, and the nature of the riposte applied against it.¹⁶³ In essence, he argued that the value of Article 329(1) is that once the basic elements of the clause have been established as present, it precludes any inquiry into the nature of the riposte, that is, the question of whether it was proportionate or not - assuming, of course, that a danger, real or reasonably apprehended as such (within the context of the favourable night presumption) existed.¹⁶⁴

In other words, there was *no* irrebuttable presumption that a danger had existed, but where it had, there was a rigid presumption that the defence employed was not abusive,¹⁶⁵ the justification for this resting particularly on the terror which often accompanies a nocturnal intrusion, and its consequent effect upon the occupant's ability to maintain his or her *sang-froid*. The presumption as to the existence or reality of an attack was therefore rebuttable; the presumption as to the measure of the riposte to any such attack was irrebuttable. Not only did Professor Savey-Casard argue persuasively to this effect by pointing out that any other interpretation would place article 322 in an anomalous position¹⁶⁶ but he cited early caselaw in support of his views,¹⁶⁷ which have been espoused by numerous eminent commentators.¹⁶⁸

However, on reflection, it is submitted that there is not much, if any, difference between the views expressed in Garçon and those of Savey-Casard. Both lay emphasis on the argument that it is not the fact of intrusion as such which counts, and also both indicate that once danger is shown, the defender has a wide scope of action.¹⁶⁹ Indeed, the remarkable thing is that both cite the very same cases in support of their hypotheses,¹⁷⁰ and further, there is textual evidence to support such an analysis.¹⁷¹ Whatever the actual difference, it might be useful to add that with an approach so heavily weighted in favour of the occupants (at least, if one believes the claims of their proponents), then the court, though not presuming as such

the existence of an attack, should, once the basic conditions of article 329(1) have been demonstrated, examine with the utmost rigour any prosecution suggestion that the threat had passed, say by the flight of the attacker.

B. The Position of the Courts after Reminiac

The caselaw since 1959 offers a mixed series of decisions, but the impression is that the courts are aiming at a decidedly middle-of-the-road approach, and certainly the effective but cruelly indiscriminating nineteenth century principles are no longer followed. However, one may justly harbour a suspicion that the equivocation of the *Cour de cassation* in Reminiac has resulted in a slightly over-restrictive application of the law, compared with the above formulations.

In 1974 ¹⁷² the Court upheld the *arrêt de non-lieu* rendered where a father and son, on armed surveillance in their commercial premises shot dead one of two burglars as they were breaking in; and in addition to the decision of the *Cour d'appel de Dijon* mentioned above, one may cite the much-discussed decision where a cinema-owner's conviction for wounding was overturned in a case where he had shot several times at a particularly audacious burglar who, having moments earlier almost gained forcible possession of the weapon, made a dash for the exit. The Court there declined to hold him to a rigorously objective standard in his conclusions and actions. ¹⁷³ Indeed this case well reflects the fact that article 329(1) is responsible for importing (quite justifiably, in the writer's opinion) a large subjective element into the appreciation of the defender's actions, under French criminal law. This is merely one way of ensuring judicial recognition of the particularly fearful circumstances of a night attack. ¹⁷⁴

In Cr 21 janvier 1975 (Kaliszuk), ¹⁷⁵ K attempted to force his way into H's house, smashing windows in the process. H grabbed his rifle and showed himself to K in an attempt to deter him, to which K grabbed the end of the weapon. Then, as it seemed he was preparing to jump up through the window, H shot him in the stomach. The *Cour d'appel de Metz* found in favour of H, pointing, among other things to the disproportionate physical

characteristics of both parties, which would have rendered effective defence impossible had K gained entry, and to the fact that K's violent intentions were beyond doubt, since he had previously threatened H and his family. K's *pourvoi* against the decision was firmly rejected by the *Cour de cassation*, which furthermore made it clear that the lower court judgement had been reasoned by "*(des) motifs surabondants*". The message it seems was that once the qualifying conditions for Article 329(1) had been satisfied, then there was no need to adopt the 'circumstantial' approach we examined in Chapter One as a further 'layer' to the justifying context in which the incident occurred. The case is one of several examples of particularly determined and dangerous attacks on dwellinghouses, which fully justified the application of A329(1). ¹⁷⁶ It is furthermore important for its confirmation that in A329(1) cases of private defence, the burden of disproving private defence lay with the prosecution or the *partie civile*, whatever might be the case with Article 328. ¹⁷⁷

And in Cr 12 octobre 1976 (Boudebza), ¹⁷⁸ the 'uncertain' danger of a night intrusion on which A329(1) is based, was highlighted, where the *Cour de cassation* rejected the *pourvoi* of B. He attacked the lower court decision rendered in favour of L, who had, after shouting a warning, shot him one night as B attempted to enter "*les annexes de son habitation*" in order to steal chickens and rabbits. The Court pointed out that there had been no suggestion by B that L knew his intention was only to commit these particular thefts, and not to engage in a more daring intrusion upon the dwelling.

However, these decisions are balanced by a series of cases where the facts appear to have been examined with great particularity by the courts, before allowing - or in some cases - denying private defence, ¹⁷⁹ especially in relation to the condition of necessary force, and the existence of the basic elements of Article 329(1). Now, while the writer would not fault the views generally expressed on the definitional scope of a dwelling seen as a place of habitation, ¹⁸⁰ since ultimately the use of deadly force against burglars must, arguably, be limited to personal protection, he would with respect seriously question the restrictive interpretation placed on cases where force was used against a retreating intruder.

Admittedly, a literal interpretation of the conditions of article 329(1) is not presently applied, and so force may be used once the breach has already been effectuated; ¹⁰¹ but even where the intruder has fled, the preferable view is, it is submitted, that the clearest possible indication that the danger has passed is required before one holds liable an owner who used force in such circumstances - flight as such should not be used to raise a presumption against the defender, ¹⁰² and this is equally applicable to a homeowner using deadly weapons from within against an invader who may well have retreated merely in order to approach by another entrance.

F. Conclusion

One might well think that the problems surrounding article 329(1) are sufficient to justify its abrogation. In face of those who would argue that it is an anachronism which has outlived any value it may once have had, ¹⁰³ the writer would argue that on the contrary, a new emphasis is required for the clause. Ironically, whatever the theoretical beauty of *Reminiac*, it is arguably failing to offer adequate protection (from convictions as well as intruders) to those whose premises are violated at night. In *Reminiac* the *Cour de cassation* missed a clear opportunity to break with the nineteenth century rules while nevertheless stressing its determined concern for the truly effective security of the citizenry. Can it really be "stating the obvious", when individuals who shoot in the face of an undoubtedly nerve-racking attack by a very determined night-intruder - such as in the Amiens cinema case of 1965 ¹⁰⁴ - sometimes have to undergo the ordeals of examination by the investigative service, scrutiny by the prosecutorial service, trial, conviction and appeal, before being exonerated? It is in many respects a fallacy to suggest, as some do, ¹⁰⁵ that the most effective protection for the homeowner is to increase the severity of punishments for offences such as breaking and entering, ignoring as this does one of the main rationales generally accepted as underpinning the right of private defence - the absence of State protection. ¹⁰⁶

So long as there remains doubt about the precise nature and thrust of Professor Savey-Casard's proposals, it is respectfully submitted that a clear declaration along the lines of the interpretation of article 329(1)

formulated by Garçon is long overdue. The isolation of those cases involving clear abuse of the rule may be an easy task when all one is dealing with is a rebuttable presumption of law. But the courts have a clear duty to ensure that they do not do so at the expense of those who have the misfortune to find themselves forced to act in what one might loosely call the 'twilight' zone of article 328 private defence.

II DEFENCE OF PROPERTY

1. England and Scotland

On the issue of the defence of property as such, it seems clear that common sense and public policy call for a more restrictive application of the rules of private defence than where the dwelling is concerned, given that the harm presented by the attack is generally of a less serious nature than in normal aggressions against the person - and this is the view which now prevails on both sides of the Channel, although as with dwelling defence, the law is not free from difficulty and complication.

One special case is robbery, referred to specifically or otherwise by all the authorities in both England and Scotland, ¹⁰⁷ as justifying homicide where necessary, in order to prevent its consummation. The reader will however no doubt appreciate the curious position of this offence within the context of self-defence - for while the threat may be imminent, it is, (unlike that in burglary) *conditional*. Let us be clear; it is arguably the law that for killing in face of robbery to be permitted there must be more than token violence making it a technical robbery - otherwise individuals would have a splendid opportunity for circumventing the normal limits of self-defence. ¹⁰⁸ But, one could argue, would it not be socially preferable to require one to surrender the property in question, rather than, say, kill or maim, thus avoiding violence all round? The answer must be no, for it would represent a wholly unjustifiable and dangerous invitation to those with criminal designs to achieve their ends by exploiting the scruples of

society. And here we see a clear indication of the importance of one's right to go about one's business free from unlawful intrusion.

Furthermore, while there would obviously be serious difficulties, in relation particularly to the necessity requirement, it is submitted again that the right of riposte in a case of robbery is not dependent upon the value of the property threatened. ¹⁸⁹ As regards the condition of imminence, one should not necessarily be required to indicate one's unwillingness to comply with the robber's demands before using even serious defensive force, and the writer fully endorses the words of one commentator, who argues:

"If common experience justifies the belief that (his) life is likely to be in danger if he resists, the law should not require him to take the risk of testing this belief before taking protective action." ¹⁹⁰

Reported instances of killing in face of a robbery are hard to come by, but reference may be made to the case of Bridger, where a butcher had been attacked by robbers as he and his fourteen-year-old son made their way to the bank with the business takings. He pulled out a butcher's knife which he had up his sleeve, and in the subsequent clash one of the robbers was fatally wounded. At the inquest which followed, the Coroner directed the jury that:

"... of the three possible verdicts, accident, manslaughter, or justifiable homicide, there can be little doubt that your verdict must be justifiable homicide. Mr. Bridger did not commit manslaughter, because he was fully within his rights to kill his attacker." ¹⁹¹

These words pinpoint the special character of robbery - for it is less the property involved which is relevant as such, than the violence threatened or in fact employed in the course of its appropriation or attempted appropriation. Again, the overlap with the law of arrest is at its most obvious. The automatic assumption that it is the value of the property

which justifies such a violent riposte, and therefore the inference that a right to kill to prevent patrimonial loss exists, these are temptations which must be scrupulously resisted. In these cases it will be appreciated that the recovery of the property involved is really a beneficial side-effect. ¹⁹²

What is the position where at issue is the protection or recovery of the property alone ? It is in this particular area that the law is most open to criticism for failing to put with sufficient clarity the rules applicable in such situations, and for perpetuating the use of misleading or ambiguous terminology which merely renders the identification of precise legal principles all the more difficult.

It does seem only reasonable to use non-deadly force in protection of one's property, against a thief or someone who would destroy it. There is clearly no disproportion in punching someone who would make off with your motor-car - and naturally, were he to resist, the normal rules of private defence would come into play. ¹⁹³ But what of homicide ? In England, Coke tells us that a man shall never give way to a thief, but the statement must be treated with great caution for in the context it is clear that he is in fact speaking of a robber. ¹⁹⁴

One major case, though, since the passing of the Criminal Law Act 1967, is Attorney General's Reference (No.2 of 1983), ¹⁹⁵ mentioned above, where the Court of Appeal unanimously upheld a citizen's right, in extreme circumstances, to manufacture explosive substances (in this case petrol bombs) "to protect himself or his family or his property against imminent apprehended attack and to do so by means which he believed were no more than reasonably necessary to meet the force used by the attackers" ¹⁹⁶ (emphasis added). Their Lordships expressly acknowledged the fact that the defendant's intentions were allegedly purely to protect his premises. However, it seems not unreasonable to conclude that the court was moved by the fact that it was dealing here with what would have been previously described as a "forcible and atrocious" crime, ¹⁹⁷ and it is likely that no court would be willing to assimilate the circumstances of a riot with the position of a homeowner who used such weapons against a thief. Furthermore, it is worth remarking that the probability of fatal injury from

a petrol bomb is perhaps somewhat less than that of a shotgun blast fired high against an attacker. 198

Nevertheless, if, as seems the case, general reasonableness is the test, then it would presumably be open to a jury to find that in exceptional circumstances, the use of deadly force would be justified. In this respect then, the opportunity which the test provides for the rendering of exceptional verdicts suited to exceptional circumstances is most desirable. But one may on the whole share Professor Williams's view that the law is now characterised by a most regrettable obscurity and uncertainty as a result of recent legislation; on the other hand, it will not be clear, until a case in point arises, whether the old rules which took a restrictive view of the right to kill merely in defence of property would be applied, rather than the reasonableness test now so much in favour. 199

So far as Scotland is concerned, the interesting feature is the relative ambiguity among early doctrine and the caselaw in point. As observed by Gordon, 200 Hume's position is more than equivocal. For despite his apparent insistence upon a threat of serious harm, this is confounded by his admission that one could probably in some circumstances kill to retrieve property from an escaping thief. 201 And speaking of robbery he adds *"Besides, if once surrendered my property is gone, and with but little hope of recovery."* 202 suggesting that while not necessarily determinant, the threatened loss is an important factor to consider. Burnett meanwhile, in sequence, (a) doubts whether killing an unarmed robber would be justifiable for it would probably not be necessary 203 (b) states that we are not justified in killing one who secretly steals from one's person 204 and finally (c) tells us that *"The same right of defending our property, may also justify our killing a thief or predonious invader, in the act of running away with our goods if he cannot otherwise be taken, or the goods secured."* 205 However, Hume's view is expressly disavowed by MacDonald, 206 who declares simply *"It is personal danger not patrimonial loss which justifies homicide."*

The case of Edward Lane, 207 which involved the killing of a fleeing housebreaker saw the court charge that the recovery of the property was one possible justification, and likewise William Williamson. 208 resulted in acquittal, but the cases must be treated with some caution, as they both

involved a *fur nocturnus*.²⁰⁹ In face of this there is an array of decisions and dicta which do suggest support for the minority Scottish writers. James Cran²¹⁰ is cited firmly by Gordon as settling the rule that killing to defend property is not justifiable - though even there, the writer would, with respect, submit that the case is not entirely conclusive, concerning as it did merely game.²¹¹ However, the subsequent decision in John McBryde²¹² possibly indicates a greater rigour in the law, where for having discharged a fatal 'warning' shot against marauding potato thieves, a young farm labourer was convicted of culpable homicide. The clear implication was that had intention been proved, a murder charge would have been sustained.

But whatever the nineteenth century position, by the twentieth century the restrictive view appears to have gained even greater ground, so that one may not unreasonably concur with Gordon²¹³ who cites the case of McLuskey v H.M.A.²¹⁴ as implicitly deciding that only life-threatening violence or rape may justify killing in private defence, further adding that the law's refusal to permit such defence against forcible sodomy would be incompatible with a right to defend property by deadly force. It is to be noticed however, that whatever the tenor of Lord Justice-General Clyde's language in McLuskey, his words on the case before him are chosen with particular precision, and it is just possible that one might reasonably interpret his caution as belying a reluctance to commit himself on any other matter not specifically put before the court.²¹⁵

2. Analysis

While understanding fully the rationale for precluding outright the use of deadly force to protect property, the writer cannot support the view that it must always be excluded. With arson we see a widening of the rules of normal private defence; burglary and robbery are certainly more directly linked to threats against the person, but it is submitted that even outside these cases, there are situations where threatened patrimonial loss is a harm of such enormity that killing, where necessary, would be justified.²¹⁶ Human life is to be accorded the highest possible (= reasonable ?) respect, but while one would vigorously maintain an outright prohibition of the

killing of an innocent, the life of a criminal is not *per se* sacred. One cannot, it is submitted, rightly preclude any examination for the purposes of private defence of the deleterious effect of his or her behaviour on human circumstances the moment that the physical safety of the victim is not at issue.

Obviously such cases will not be frequent, for especially with the widespread availability of insurance, the need to preserve property at all costs must be less obvious - but the rarity of the situation is irrelevant to the existence of the principle. By "infrequent" is obviously implied the imposition of a very high standard of proportionality, but once this standard is achieved, any necessary deadly force falls to be justified and not merely excused if the full protection of property-owners in such situations is to be ensured.²¹⁷ Evidently, such a view cannot in itself be proved by mere attempts at logical persuasion, for ultimately one's position on the matter must rest upon one's own particular convictions. But it is submitted that on some occasions the normal protection accorded to even the lowest scoundrel may be outweighed by the damage he threatens to inflict upon an individual (and upon society) through his actions.

The crucial problem remains precisely this question of the ultimate standard to be applied. Should it be objective and fixed, or measured according to a subjective standard, linked to the particular circumstances of the property owner? The Indian Criminal Code Bill Commissioners pointed out the anomalies which may arise when a strict rule against deadly property defence is applied, citing the case where a personal theft threatens to ruin an already impoverished individual;²¹⁸ but equally, problems are ever present whenever such a rule is relaxed.

Obviously non-deadly force is permissible, but this proportionality problem is inherent in the issue of deadly force defence. In favour of a subjective standard one might point to the great variations in the financial status of the victims, this in turn varying the degree of harm inflicted upon them. For the loss of twenty thousand pounds is less damaging to a millionaire than to someone whose entire life savings are constituted by this sum. This position however invites criticism for one may retort that the millionaire travelling in his Rolls Royce has as much right to his

twenty thousand pounds as the man riding on the Clapham omnibus, and object that any other standard would fall foul of the principle that people ought to be able to act according to pre-determined standards - must X really calculate the value of his estate as he loads his shotgun, takes steady aim and pulls the trigger ?

One's answer will depend partly on whether one takes as decisive the interests of society or those of the property-owner, for in the former case the precise situation of the victim would, arguably, be irrelevant. ²¹⁹ It must be noted though that here we would be straying once again into the gray area of the overlap between property defence and arrest or the prevention of crime. But one would do well to consider the question-begging nature of any reply which asserts the prevention of crime as the real basis for any use of force - it is only logical to inquire what it is in the particular crime which so impels the law to admit the use of force. Indeed one has to point out that in strict terms it is really only defence of property (or arrest) which may apply, since the crime is already committed.

It would appear that the only workable solution would be to allow the flexibility of the reasonableness test to be applied here. However, it needs to be stressed that the cases of justification would undoubtedly be rare, as most would fail the necessity and proportion tests, more notably the latter. There would also have to be a crucial safeguard included by providing that the judge would have the power to withdraw any question of property defence from the jury where proportion could not on any reasonable view be made out. ²²⁰ It cannot on any grounds be reasonable to kill the thief fleeing with a handful of sweaters from the local department store. It cannot be justifiable to shoot the thief who has made off with one's television (or indeed, one's horse). But the writer can in no way assuredly declare that reason, justice and public policy demand that one convict, or even merely excuse, the shopkeeper who, victim of repeated thefts, stripped by the hardness of the culprits of any insurance cover he may once have had, and on the verge of bankruptcy, chooses to use necessary deadly force, rather than stand by as thieves make off with his entire stock. ²²¹

One should appreciate the restrictive nature of the above view - thus the writer would prefer to say that in given circumstances one *may* rather than one *will* be able to employ deadly force, ²²² so that the law should be applied on a case by case basis. But one may regret the fact that, with the passing of the Criminal Law Act 1967, and given the uncertainty which still reigns surrounding certain statements emanating from the Scottish Bench, one must await the misfortune of some unwitting thief (and his intended victim) in order to clarify the law on this crucial matter.

3. France

While in Britain the authorities were pondering the precise limits of property defence, in nineteenth century France commentators were actually grappling with the question of its very existence. The four major arguments of those who rejected the concept rested upon the law's silence on the question of property, where private defence was concerned; the claim that unlike injury to life, limb or honour, attacks upon property were never irreparable; the related assertion that recourse to the courts was always possible, to seek restitution or reparation; and finally and most damningly, the manifest disproportion between the danger averted and the harm inflicted upon an attacker. ²²³

However, closer examination highlights the flaws in such reasoning. The textual arguments are, according to some authors, defeated by the existence of Article 329; ²²⁴ but the present writer favours as more persuasive the objection that the construction of statutes applies *in favorem* where justificatory pleas are concerned, and therefore that the *Code pénal* merely asserted a general principle susceptible of extension. ²²⁵

Also, it is clear that some losses are irreparable; and the notion that one file a claim against a thief who is in any case more than likely to be insolvent surely merits little consideration. ²²⁶ And finally, it was their failure to distinguish the right of private defence from its scope which induced so many writers to object to the principle of the defence of property. As pointed out by several commentators, private defence is only justified where the response is measured (proportionate) and so this does

not as such preclude property defence *per se*.²²⁷ Implicit therefore was a more rigorous application of the requirement of proportion, now almost unanimously endorsed where property defence is concerned.²²⁸

Yet, and not without some irony, many authors endeavoured to find some other principle upon which an acquittal could be based, and a handful of alternative theories, some more popular than others, were forwarded. Firstly, some argued that while Articles 328 and 329 were of no help, the accused could plead a form of duress under Article 64 instead.²²⁹ Alternatively, the possibility of an "*absence d'intention*" or a plea of necessity would be advanced.²³⁰ Clearly though in the vast majority of cases this would not be so, the defender acting in full awareness of the surrounding circumstances and of his own particular intentions.

However, it is obvious that all these solutions are significantly flawed, if only in the ambivalence towards property defence which they demonstrate - the general tenor of many writings gave the distinct feeling that their authors rejected the principle, but favoured the practice and were consequently forced into some tortured reasoning in order to somehow rationalise the latter.²³¹ The above views are open to criticism in that they hide the fact that what is being advanced is an excuse rather than a justification;²³² they would be inapplicable - or else applied totally incorrectly - in cases where the actor had displayed a cool head and acted volitionally; and they sidestep the need to admit that in some cases certain property may be protected even by inflicting serious harm.²³³

This last criticism applies equally to the argument that the power of arrest could intervene in favour of the accused,²³⁴ for this could only apply where the theft constituted a "crime", which is not always the case. And strictly speaking it would not provide a basis for recaption, since the accused's intentions would be the recovery of his property and not the bringing to justice of the wrongdoer.²³⁵

Gradually, then, French doctrine swung round in its views until today all writers accept the principle of property defence. Any other solution would, it is submitted, be illogical, questionable in its foundation, and grossly unfair to the defender. As rightly pointed out by some

commentators ²²⁶ if one looks to the essential rationale for private defence, namely the absence of State protection, then one sees that where property defence is at issue the situation is no different from normal situations of personal defence.

But having accepted it, to what position does one assign it in the Code ? Is Article 328 appropriate, or Article 329 ? To those who would point to the latter one may object, as mentioned earlier, that this would unduly restrict the operation of the plea, limited to only two specific situations. In addition, it is clear that this view really fudges the issue, for both clauses concern particular instances where the defence of person as well as property is concerned. ²²⁷ The writer fully endorses the words of Professors Stéfani, Levasseur and Bouloc in their assertion that:

"Une telle limitation, malgré les arguments sur lesquels elle s'appuie cadre mal avec le fondement assigné par le Code à la légitime défense. Du moment qu'elle se justifie généralement par l'exercice d'un droit, et même d'un devoir, de participation à la défense de l'ordre social troublé par l'agression, elle doit être étendue à toutes les agressions, quel qu'en puisse être l'objet." ²²⁸

And it is submitted that the only reasonable interpretation is that as with personal attacks, violence employed in defence of property falls, subject to the proportionality rule (for this is the key to the admission of the principle), under the general justificatory plea of Article 328 and not Article 329.

Turning briefly to robbery, it is self-evident that violent theft pre-occupied the French legislators just as much as it taxed the minds of the common lawyers. Yet there is a curious silence among most commentators on the precise subject, all the more surprising given that Article 329(2) was enacted specifically to cover such eventuality, in response to the infestation of brigands on the highways of France in the early years of the nineteenth century. ²²⁹ It seems to have lost none of its relevance today, yet many commentators would be found consigning it to the position of a

were afterthought in their writings, with frequent reference to its anachronistic nature. ²⁴⁰

One can only conclude that robbery has been habitually treated under Article 328, for certainly it is very difficult to come across cases directly in point citing Article 329(2), ²⁴¹ and Doyen Bouzat appears correct when he says that it seems hardly to have been used since early last century. ²⁴² Closer inspection might suggest the need for a separate 'privileged' clause to be far less compelling than for the special situation of a night attack, for here the requirement is that there be actual violence in the first place - which seems to partially defeat the purpose of a presumptive clause.

Be that as it may, just as, in England, the case of robbery has always been accorded a special status in the law, it is submitted that Article 329(2) should be retained. Robbery is a particularly serious offence, and the nature of some recent incidents in France ²⁴³ leads one to agree with the view now being expressed by one or two commentators, that there is indeed a case not only for retaining the provision in the Code, but for actually reviving its application. ²⁴⁴

Caselaw

As regards caselaw on the defence of property in general, there is some doubt as to the position of the courts on the matter, but the most popular candidate for the establishment of property defence is the de Fraville case of 1902. ²⁴⁵ Nevertheless one cannot be certain on this point and one might point out that in Cr 8 décembre 1871 (Casabonne) ²⁴⁶ it was more or less stated that the killing would have been no less permissible had the intruder been a thief. More importantly the cases are confounded partly by the fact that they involved night time intrusions and thus, *prima facie* Article 329(1), the precise nature of which was not then clear; and also by the fact that the de Fraville case involved the operation of an explosive 'booby-trap', which according to some writers may found its use on a basis totally independent of the principles of private defence. ²⁴⁷

The decision of the *Cour de cassation* in 1942 ²⁴⁸ involving a twelve-year-old thief shot as he fled, saw the invocation of Article 329(1), but the court appears to have only viewed it as involving inquiry into danger to persons, not to property. In contrast the *Cour de cassation* in *Remiliaq* admitted the principle, at the very least in the context of Article 329, referring to "*un danger grave et imminent dont le propriétaire ou les habitants aient pu se croire menacés dans leurs personnes ou dans leurs biens.*" (emphasis added).

It may seem incredible to common lawyers, but certainly one eminent commentator was asking in 1946 if the defence of property as such was permitted ²⁴⁹ while another cites a 1956 case as the first decision expressly recognising the principle; ²⁵⁰ but this is understandable, given that most cases have involved night intruders or other factors producing an overlap with defence of the person, and it is probably more correct to say that the principle slowly developed from the lower courts than that it was handed down from on high by the *Cour de cassation*. ²⁵¹

On the issue of recaption, several cases have made it clear that the principle is acceptable and falls under private defence. In the civil case of Montpellier 19 novembre 1979 (*Benkourdel c Redonnet*) ²⁵² the *Cour d'appel* held justifiable the action of a retired *gendarme* who shot through the windscreen of a car which thieves were using to escape after a break-in at a nearby shop, seriously injuring the driver. He was held justified by virtue of Article 328 for having acted in defence of the shopkeeper's property, according to the Court, which, in regard to the posterior limits to private defence ²⁵³ rightly took a common-sense approach to the matter. With respect to Professor Puech who provided a comment on the case, the writer cannot agree with his exclusion of private defence; the aggression against property surely cannot be treated as over merely because the thief has caught hold of the item, and it is surely more reasonable to treat the entire incident as one transaction whenever recovery is made upon hot pursuit. To use one analogy, are we to renounce our efforts to protect a child the moment his (or her) kidnapper manages to secure him, and is in the process of fleeing with his captive? Leaving aside the question of arrest, though, one may perhaps doubt the alleged proportion of the riposte, although admittedly there was some questioning of threatening gestures from the

occupants of the car (which of course brings one back within the scope of defence of the person).

And on this question of proportion, one may applaud the classic decision of the Cour d'assises de la Loire 28 janvier 1920 ²⁵⁴ which convicted the accused for having shot an individual who was stealing from his orchard - the disproportion was clearly manifest, whatever the position regarding necessity, and the case is an excellent illustration of one of the twin requirements of a self-defence plea. Of course, normally a mere warning-shot would be all that is required in the case of many minor (and serious ?) thefts, and will be clearly commensurate with the harm threatened.

On the other hand, an acquittal followed, confirmed by the *Cour d'appel de Dijon*, in the case of an owner who, following an attempted break-in, and in the middle of a spate of burglaries in the locality, installed a spring-gun forty centimetres above the ground, after notifying the police. The original intruder, a fifteen-year-old boy, returned one night effectuating what constituted an Article 329 entry, and on entering the house received a shotgun wound in the legs. ²⁵⁵ While in 1967, the *Tribunal de Grande Instance de Caen*, ²⁵⁶ in a civil action, refused the benefit of the plea in justification to a man who shot in the legs, from a certain distance, a fleeing burglar whom he knew "*ne pouvait emporter que de petits objets ou outils d'une valeur minime par rapport à celle d'une vie humaine qu'il prenait le risque de détruire en tirant un coup de feu...*"

One can of course take this last case from two different angles. One may prefer to point to its restrictive aspect in its refusal to hold the actions justified; or, one may point to the fact that the Court seemed to accept that had the property been of a greater value, then such potentially lethal action as was taken might have been justified. On this last point, however, the court remained silent, leaving the reader to guess just what kind of valuables it had in mind.

Likewise, by many commentators we are told that property defence is permissible so long as the riposte is proportionate, ²⁵⁷ but, with the greatest of respect, one may question the rather open-ended nature of such

assertions. It would arguably be preferable if they committed themselves one way or another on the precise question of just how far proportion holds. It is equally easy to condemn (and rightly so) the killing of fruit thieves, but, as pointed out with refreshing directness by one author, *"l'argument est un peu facile, qui suppose toujours que l'intrus n'était qu'un jeune enfant frugivore."*²⁵⁸ And while many commentators are still somewhat evasive on the issue of (potentially) deadly force,²⁵⁹ one may at least congratulate the courts for having faced the issue, despite their reluctance to delimit its precise scope of application. And, it is submitted, such caution is more than understandable for the area of property defence is, as has been said, possibly the most vulnerable to abuse of all issues arising out of private defence.

4. Conclusion

From the above it would appear that the application of private defence to cases involving the protection of property requires a particularly subtle appreciation of the facts of each case. How does one treat the man who shoots to prevent his chickens being stolen for the sixth time? who kills to protect the car he has just bought; who inflicts serious injuries in defence of the treatise on criminal law he spent twenty-five years compiling; the tramp who kills the thief running off with £15, his only property in the world other than the clothes on his back - (a) in Welfare State Britain (b) in poverty-stricken Upper Volta; the bricklayer who fires at the thief running off with his £5000 life-savings - or where this sum is part of his £100 000 share of the pools win he and his colleagues have just collected? The list could go on. But as mentioned earlier, property defence to the extent of the commission of homicide cannot *a priori* be excluded in exceptional cases, and the writer respectfully agrees with the formulation of Garçon where he states:

*"...De simples atteintes à la propriété justifieront sans doute certaines mesures défensives, mais non l'homicide et les blessures graves. Tout au moins ces violences ne pourraient être autorisées que dans des cas tout à fait exceptionnels..."*²⁶⁰

(emphasis added)

One may share Professor Williams's appreciation of the tight firearms control in Great Britain, but common lawyers should be most wary of the temptation to adopt the comfortably superior position of criticising the French judiciary in their attempts to deal with a problem from which we on this side of the Channel have by and large been mercifully spared. And the French courts have had to face the problem squarely. While the Scottish judiciary seem to have, quite understandably, opted for a blanket rejection of the plea where extreme force is employed in defence of property, the French have taken a more pragmatic approach, and if a single discernible trend in jurisprudence is difficult to isolate, it is arguably a direct reflection of their efforts to approach matters on a case-by-case basis, reflecting the subtle differences which exist from one particular incident to another, and thus avoiding the most dangerous course of setting a rigid precedent upon which thousands of property owners would possibly rush eagerly to act.

Whatever the jurisdiction, whenever a person finds himself convicted for shooting a thief fleeing with a handful of goods, we witness a direct application of the proportionality principle, requiring that in that particular case, *irrespective of necessity*, the loss should have been suffered rather than serious physical harm inflicted. It is precisely this aspect of the law of private defence that so many find difficult to accept, particularly present as it is in the area of property defence. But somewhere lines do have to be drawn, and where they are set is an indicator of society's efforts to achieve a balance of interests, attempting a subtleness which is regrettably not always present whenever a shotgun is fired or a rifle discharged.

However, private defence cannot be viewed and treated in isolation from the particular social context in which it is exercised, and where this is one of despair at the powerlessness of public authorities, the urge to act is all the greater and the dangers all the more acute. None more so than in the case which we examine in the final section, where private defence is resorted to by the means of inanimate devices, frequently of an explosive character.

III PRIVATE DEFENCE BY MEANS OF AUTOMATIC DEVICES

The major justification for private defence is the notion that the citizen intervenes due to the absence of (effective) protection from the public authorities, notably the police. But just as the latter may fail the citizen, so too the private individual himself cannot ensure permanent vigilance for the safety of his person, and still less is this possible for the protection of his property - for example when he is asleep, at work, or on holiday and so on. This difficulty has spurred some to employ mechanical or explosive devices, or booby-traps, in an effort to maximise the protection possible, and as ever the law has had to provide answers to many questions provoked by a practice which no doubt it had never in its origins envisaged.

Firstly, of course, "passive resistance" in the form of locks, bolts and alarms raises virtually no problems of criminal liability and is only to be encouraged; but the ingenuity of the criminal mind and the technical problems sometimes associated with such practices often conspire to defeat these first resort techniques. ²⁶¹

However, it has been objected that the use of automatic devices such as booby-traps is not permissible for it fails the requirement of imminence, in that one may never 'defend' against a future aggression. ²⁶² A moment's reflection however reveals the flaw in such criticism for the 'defence' itself is only latent and may indeed never be activated. It is *conditional* upon the 'actuality' of an attack and at that moment of attack the conditions of private defence are satisfied - the situation is somewhat analogous to the right which exists in all three jurisdictions to pre-arm oneself against a future identifiable danger, ²⁶³ and it is submitted that the lack of a specific source of danger here, is well compensated by the peculiarity of this situation, in that the owner cannot be physically present to defend his property in person, a factor which again justifies a slight modification of the normal rules of private defence.

Equally unpersuasive is the argument that the 'non-human' aspect of the defence is *per se* preclusive of the justification. ²⁶⁴ Such considerations are, it is submitted, irrelevant. What is important is not the mode of the

defence, but the measure. Looking then to the substantive law on such devices, it is necessary to divide them into two classes.

1. Deadly Force Devices

In all three jurisdictions the use of devices which trigger deadly force is viewed with general disfavour. In Scotland, the case of James Crow ²⁶⁶ established the illegality of such machines, when the High Court of Justiciary sustained the relevancy of a charge of murder against a gamekeeper who had set a spring-gun which subsequently killed a poacher on his master's estate. In England, their use is regulated by statute, the Offences Against the Person Act 1861, section 31 of which ²⁶⁶ makes it unlawful to set or permit to be set *"any spring-gun...or other engine calculated to destroy human life or inflict grievous bodily harm..."*²⁶⁷ However there is a proviso which exempts one from the terms of the Act where the device is placed in a dwelling-house at night. ²⁶⁸

The impression is, certainly, that a homeowner enjoys considerable protection as a result of the proviso, which would be well in line with the general position of the English criminal law in relation to dwelling defence. Be that as it may, it is nonetheless surprising that the practice is so infrequent there. It is worth pointing out that the statute does not as such expressly authorise, still less actively encourage, the setting of such instruments. In view of the rather restrictive language of the provision, the writer would venture to suggest that one would be ill-advised to treat the satisfying conditions of the proviso as guaranteeing blanket immunity from criminal liability in the event of death or injury to another, ²⁶⁹ and the placing of the devices would arguably have to be accompanied by reasonable precautionary steps such as the placing of notice, or at least care in the positioning of the machine so as not to constitute an undue hazard to innocents nearby, before a plea of private defence could succeed.

It is to be further noted that the statute speaks of a *dwelling-house*. In one modern case ²⁷⁰ the facts were that the accused had connected a live electric wire up to a window-frame in his shop, which subsequently killed one P who came there with intent to steal. The premises had been broken into many times, and goods stolen. But, after tendering a plea of guilty to

manslaughter, he was given a 12-month suspended sentence at Manchester Crown Court, for what the trial judge called his "foolish and unjustifiable act".

Whatever the position, the writer would strongly recommend, given recent judicial attitudes in Scotland, that those intent on testing their theories as to the present law on this matter, would do well to conduct their experiments south, rather than north, of the Tweed.

As for France, one may doubt whether the decision in de Fraville would now be followed - partly as a consequence of the judgement in Reminiac, certainly insofar as trespassers on land are concerned. Of the seven 'booby-trap' cases decided since de Fraville ²⁷¹ only two resulted in acquittals, one ²⁷² where great care had been taken to minimise the effect of the actual discharge, while in the other, where the burglar died of his severe wounds and his companion was seriously injured, the acquittal came - after one of the most sensational trials of the 1970s ²⁷³ - from a popular assizes jury and is therefore of restricted value in terms of pure legal principle.

A. Arguments in Support of Deadly Devices

1. The Hypothetical Presence Argument

Dwelling defence is *prima facie* the situation of private defence most favourable in law to the accused, and it is in this context that the use of such devices has often been pleaded, most visibly in France under Article 329(1). ²⁷⁴ But let us consider the assertion, often heard, that in cases of burglary, say, one may in an inhabited house employ deadly force by night since this is permitted where, for example, the owner is actually present facing the intruder. ²⁷⁵ Surely the essential difference is that where, say, the owner is upstairs in bed, he is protected from the fear and panic which a confrontation with a night intruder might easily provoke, and which would attract a more indulgent view in court of the accused's actings. ²⁷⁶ Thus the fact that the building is technically occupied surely is no reason to circumvent the already relaxed rules of private defence which apply in a

dwelling after dark, and the writer cannot share the view that mere occupancy suffices to support an acquittal. 277

Still less persuasive then is the not uncommon reasoning in some Anglo-American jurisdictions that even where the building is unoccupied, deadly force may be justified, on the principle that *"had the owner been physically present, he would have been authorised to use such force"*. 278 The rule rests partly on the long-established notion of forcible felonies, but whatever the reasoning, it surely in no way reduces the absurdity of a rule whereby *"an occupier...is held not to be liable if the devices kill or maim a trespasser who enters with an actual felonious purpose and whose entry the occupier, were he present in person, could only prevent by killing or maiming him"*, 279 for the maxim begs desperately not one but two questions.

Firstly, how can one tell by what means *"he could only prevent intrusion"* since no-one is there to observe what is in any case an *imaginary confrontation* ? The rule of necessity has by all accounts been totally abandoned. And secondly, have we not seen that the burglary rule is based largely upon the presumption of personal danger presented by the attack ? Given this, how can one justify deadly force, even assuming one could credibly answer our first question, when there is no danger, for the simple reason that there is no victim ? It is no answer to shift the emphasis on to prevention of crime, for this merely invites the same inquiry, the very one we have highlighted before - what is it about the empty house which would allegedly justify deadly force in its defence ?

It is submitted then that there can generally be no justification for the setting of deadly force devices even in an inhabited dwelling house. 280 But in any case, for this privileged defence of the dwelling, the requirement of actual habitation will apply, and often this will not be satisfied, such as where the owner is absent, or the building is not as such a dwelling-house. 281 In such cases the owner will have to fall back either (rarely) on the normal right of self-defence, 282 or more frequently, on that of defence of property - in France Article 328 of the *Code pénal*. But, as we have already seen, the latter plea is far more restricted than normal

private defence, being subjected to a much more rigid interpretation of the proportionality rule.

The burglary rule which is used in the above argument is basically an assertion that one may do indirectly what one may do directly; but the supposed logic of this reasoning is in fact erroneous, being based upon an artificial assumption of the existence of justifying conditions; and indeed the one does not even necessarily follow from the other. Still less then, in the case say of a mere intrusion upon land, is there room for justification, for (subject to the comments below) it is an essential principle of the criminal law that a man may not do indirectly what he may *not* do *directly* (such as for example, inducing a madman to commit murder at one's behest); the interposition of a third party in no way attenuates one's criminal responsibility.

It is this general principle which partly guided the court in James Crow ²⁰³ in holding relevant the indictment for murder ²⁰⁴ although of course here the facts were even more unfavourable to the accused due to the trespass being merely upon land; but it is submitted that the words of Park, J. in the English civil case of Deane v Clayton ²⁰⁵ are - subject to the above qualification - of general applicability where, speaking of dog-spears, he said, referring also to the implication for the necessity rule:

"I have ever thought it quite clear, that no man shall do that indirectly, which he cannot do directly. The placing these dog-spears for the express purpose of killing is, as appears to me, just the same as if the Defendant had placed a man there for the purpose of shooting. Nay, it is worse; for in the one case a man would exercise a discretion but here, death must inevitably issue without any discretion being possible to be exercised, without any regard to circumstances and without giving the opportunity of knowing what the circumstances might require...²⁰⁶

This objection was countered by the Court in the civil case of Hott v Wilkes, ²⁰⁷ where it stated that the giving of notice sufficed to

preclude liability, and therefore the injury was in fact the act of the intruder himself. On this first point though, the giving of notice is surely irrelevant; the fact that I most earnestly warn X that if he kisses my girlfriend I shall kill him in no way renders justifiable that which is criminal. Why should it be any different in cases of trespass? It could in rare cases be relevant in terms of civil liability, but arguably cannot remove the defender's liability under criminal law for any abuse of his defensive right. If it were otherwise, the issuing of warnings would become a form of insurance policy against criminal proceedings *irrespective of the effects of the riposte*. We thus find too, in France, that whereas the giving of notice was once not even necessary, it is now by all accounts insufficient in law to protect the owner from the consequences of any abuse. 200

11. The Acceptance of Risk Argument

Related to the notice argument is the common claim that the intruder thereby accepts to run the risk and so is solely responsible for his injuries. 201 To this several objections may be made. Firstly of course, the intruder may treat any notice as mere bluff and venture forward to continue his enterprise. But even where this is not so, the idea that the trespasser or thief accepts the risk falls foul of the principle that the consent of the victim is no defence in the criminal law where lack of consent is not a constituent part of the offence; 202 such a principle clearly is in concordance with the interests of society in holding to a minimum (within reason) the scope for the commission of acts which are *prima facie* of a criminal and anti-social nature.

But even more importantly, assuming such an argument to be *factually* valid, its legal relevance is not obvious. If X decides to punch Y, or swing a kick at him, he is of course running the risk that his victim will personally reply with force totally incommensurate with the necessity or proportion of the occasion. Yet no-one doubts that Y will be answerable for any such over-reaction - even if the plea of provocation is allowed the criminal quality of the excess is still not removed, as we saw in Chapter

One. Why then should the situation be any different here? Besides, as was once rightly put,

"...to argue that a man willingly loses his life, to acquire an apple or a partridge, is an argument that carries its own refutation along with it..." 291

As for the argument that the act is that of the victim not the setter, it is only partially correct. True, the court in James Cran, rejecting the principles on which Hott v Wilkes was based, did in fact err when it assimilated a spring-gun case to that of a poisoner, who employs the hand of his victim to consummate his crime. For, where notice has been given, the essential difference between the two is that of the victim's potential awareness of the risks involved. 292 But this brings us back to the causal link with the setter; for while the intruder may in fact expose himself to the danger, (a) the ultimate source of that danger is the owner who placed a mechanical agent as it were, to act in his place; and, more damningly, (b) this is a risk to which the owner is not in law entitled to expose the intruder, thief or trespasser, and it is this which in law defeats any logic of causation which the above reasoning may offer, revealing its meretricious nature. Quite simply *"la lâcheté de l'attaque ne dispense pas la riposte d'être loyale."* 293

With such thoughts in mind one may turn to several other arguments offered to rationalise the use of such devices.

iii. The Absence of Intent

According to some, there is a clear absence of criminal intention, since no particular person is aimed ^{at} by the device. But the reasoning does not hold, for in the example of murder, one's intention or recklessness in relation to any particular person need not be shown for the charge to hold. The classic case is that of the gunman who fires randomly into a crowd of people; here he is, if anyone is killed, unquestionably guilty of murder in normal

circumstances, irrespective of the fact that he did not have any particular individual in mind as his victim.

The writer would, however, wish to point out at this juncture that the frequent identification of a serious risk to innocent persons which undoubtedly accompanies the use of deadly devices cannot be treated as a determinant factor. The point is frequently cited, but it is, arguably, rather misleading; for the moment one takes the view, accepted here, that such devices are, other than in the most exceptional cases (which will usually involve personal danger to the defender), ²⁹⁴ disproportionate both for the rogue and the burglar, then one's point is made and there is no need to cite the harm done to innocents as a motivating factor; one should aim to debilitate not exterminate. The use of such reasoning is understandable, but once the above position is adopted, superfluous, ²⁹⁵ with the added disadvantage that it diverts attention from the real issue which is the infliction of disproportionate harm.

iv. The Displacement of Risk

One may also dispose of one other argument, derived from civil law and employed by some French commentators, namely that it is not as such the owner, but the actual possessor of an object, the person who has the guard of it, who is responsible for any deleterious consequences arising from its 'use'. ²⁹⁶ In the case of a booby-trapped transistor-radio for example, ²⁹⁷ once it is in the hands of a thief then, there is in effect a displacement of both risk and responsibility. But again this runs into the same objections regarding risk and its 'acceptance' outlined above. What is more, the principle cannot be taken as a straightforward and universal rule, for once again one has to look at the entire circumstances of the incident in question and the intention or purpose of those who set the device. A limited principle of civil law cannot be taken to legalise for the criminal sphere - any more than it does Russian roulette - some modern-day lethal form of "pass-the-parcel".

v. The Right of Property Enjoyment

One final suggestion, disarmingly simple, has found some favour with commentators on both sides of the Channel, and puts the rationale firmly outside the sphere of private defence. The owner, according to this reasoning, is merely exercising his right of property, his power to do with his property what he pleases within his own grounds, and once again any fault lies with the intruder.

In France - as with England at the time of Hott v Wilkes - the argument is lent plausibility by the fact that no text actually prohibits the setting of booby-traps, and although no provision actually authorises their use, many commentators bolster their arguments by pointing to Article 544 of the *Code civil*, arguing that it enshrines as absolute the right to enjoy one's property as one wishes. 298

It is important not to confuse the question of an absolute right to defend one's property (e.g. garden, house) with that of an absolute right to enjoy, to use, one's property (booby-trap). It is the latter which is presented here. Hence, runs the argument, just as one may put a garden-gnome in one's patio, so too may one place an explosive device. No-one asks an intruder to come and interfere with it. And if it happens to be an item of property which explodes, that is just unfortunate. It is this distinction which has allowed some commentators to permit the use of such devices, while rejecting the principle of defence of property. 299

Furthermore it is one interpretation of the de Eraville case that the Court there based its decision on the above principle. 300 Some writers, interestingly, would reject the killing of a trespasser by direct means, as constituting an abuse of the right of self-defence and so, as Lambert tells us "*...autre chose en un mot est défendre son bien, autre chose en jouir en le faisant être ainsi qu'on veut.*"

Such reasoning, however, is only superficially plausible. While admittedly there is some doubt about the de Eraville case, the French equivalent of Hott v Wilkes, it has been argued persuasively that the *Chambre de requêtes* actually based its decision on the irrebuttable

presumption of Article 329(1) which then applied. ³⁰¹ And even were this not so, the basic premise of the argument is false, for the right of property is not absolute, as any reading of the Code civil demonstrates. ³⁰² It is a fundamental principle of civil law going back to Roman times that the right is constrained by the equal right of neighbours and other third parties to be free from unreasonable risk created by the exercise of the former, and this is not limited to harm occurring outwith the limits of one's land. ³⁰³ But in any case, let us carry the argument to its logical conclusion. For if the right of enjoyment of one's property itself is absolute, then that absolute right should surely be capable of protection by absolute means; and so even direct homicidal self-defence should be permitted on the above principle. There is surely no compelling difference for differentiating between the two.

B. Conclusion

Instead, the writer prefers the view of Cattan ³⁰⁴ who places the act squarely where common-sense tells us it ought to be, and he sees no reason why, simply because the riposte is by mechanical or explosive device, it should not obey the normal requirement of proportionality. ³⁰⁵ And the final reply is, surely, well delivered by the eminent jurist Lyon-Caen (insofar as his words are applicable to homicide), commenting some eighty years ago on the de Frayville affair:

"...en présentant cette objection on tranche la question par la question. De quoi s'agit il en définitive ? Il s'agit de savoir si l'exercice du droit de propriété permet au propriétaire d'aller jusqu'à protéger son bien en tuant ou en blessant la personne dont il a à redouter une atteinte portée à son droit par un vol ou par un fait analogue. La question est résolue par les art. 328 et 329 C. pén., et la solution qui résulte de ces articles est défavorable au prétendu droit du propriétaire, qui n'est pas absolu." ³⁰⁶

In short, whatever the apparent merits of some of the above arguments, the inescapable objection is simply that the use of such devices constitutes

a flagrant breach of the proportionality rule. Thus in James Cran it was totally disproportionate to kill the poacher for the sake of a few pheasants, and rightly the *Tribunal de Grande Instance de Toulouse* came to the same conclusion in its decision of 8 octobre 1969 (M.P. c Malabave et autres) when it convicted on a wounding charge a septuagenarian who had rigged up a shotgun in his henhouse, with spectacular results. 307

He had befriended a young lady who, in return for his considerable intimacy and occasional offerings of eggs and poultry, took to raiding his chicken-coop on several occasions along with some friends. On the night in question she received a blast in the chest from the 12-bore double-barrelled shotgun, set to discharge the moment the door was opened. The court in fact erroneously refused to admit the principle of defence of property, but in any case conceded that had it been in question the disproportion in the riposte was clearly made out. Furthermore, the want of any precautions, such as locking the door in question, and the accused's suspicions as to the intruders' identities merely served to indicate to the court that this was more a case of revenge rather than anything else. 308

It will be appreciated, then, that from the moment one accepts that with such devices disproportionate response is always the issue, then no amount of notice can remove the criminality of the setter's actions and in effect justify the unjustifiable. A consideration of the trial of Lionel Legras is of some value in this respect. The case, which dragged on for six years, captured the attention of a nation particularly preoccupied with the rising tide of certain types of offence in the 1970s.

Legras owned a country house - appropriately name "Le Texas" - which had been 'visited' some twelve times, without any of the culprits ever being caught. He confectioned a booby-trap from a home-transistor, put it in a padlocked cupboard and placed warning signs around his home. One night three men broke in, in order to commit theft. Having forced open the cupboard, one took hold of the transistor radio, and after a ninety-second timer delay it exploded. He received severe facial and head injuries, his stomach was opened and his right hand amputated by the blast, injuries from which he later died in hospital. One of his 'associates' was partially blinded and suffered 25% loss of motor functions. Legras was prosecuted in

the Tribunal correctionnel for, *inter alia*, homicide involontaire, but on procedural grounds ³⁰⁹ this was annulled and he was sent for trial before the Cour d'assises. In the event, Legras was acquitted of all charges, including coups mortels. ³¹⁰

While one may only guess as to the grounds which moved the jury in their deliberations, where the owner's efforts had resulted in the foreseeable death of one thief and maiming of another, if the verdict proceeded on the grounds of property defence alone, it was, it is submitted, wrong. ³¹¹ The notion that the perimeter of one's property may be transformed into some sort of domestic Berlin-wall is surely constrained by the fact that one must first be satisfied that such a measure is both proportionate, and no more than is reasonably necessary to thwart the attack.

But the most tragic and ironic fact, for all concerned, is that the use of such devices is, quite simply, grossly unnecessary. And it is this which holds a clue as to the possible foundation of the legitimate use of certain types of automatic devices.

2. Non-(inherently) Deadly Force Devices

The most obvious point is that the use of a device which discharges deadly force is entirely unnecessary for the protection of one's property. For surely common sense will tell us that prevention may just as well be effectuated by possibly serious, though not inherently life-threatening force, such as a wounding in the shins from a shotgun at a certain distance. It seems not unlikely that where an intruder receives slight chastisement from a non-deadly device, no criminal proceedings would result. ³¹² But let us be clear on the matter. Dissuasion, if it is to be of any use, must be effective. A sting in the thighs may well be unpleasant to a thief, but it is by no means certain to dissuade him from further pursuing his criminal enterprise, and there is the additional risk that he may vent his anger by embarking on the destruction of the property concerned.

Further, we may dispose of the argument that blank-firing guns should be used, for if any type of violent device were prohibited, this would raise two objections, one practical, and one of principle. Firstly, it would soon come to the attention of intruders that they could continue their criminal behaviour with impunity, their endeavours being partially protected by the practice of prosecuting property-owners who used violent devices; and secondly, it would surely be unacceptable that because the means of defence were non-human, the right of property-defence, normally limited, would here be actually excluded.

To be effective then, it is submitted that not only is "mere chastisement" permissible, but it is justifiable to employ sufficient force in injuring the intruder as to make him feel most urgently that the need for convalescence - or medical attention - is more immediately compelling than his urge to appropriate unlawfully the property of others.

The important point here is that such force is less serious than that of a deadly device which, it has been argued, constitutes a clear breach of the necessity requirement; yet at the same time it performs the very task for which it is set - the protection of property (or indeed person). What person would, having been so injured, persist in his efforts rather than beat a hasty retreat, to cut his losses as it were? And even let us assume that it is in an occupied dwelling, set for personal protection. The noise would probably wake the owner, who would then benefit from the mantle of normal self-defence and, say, Article 329(1) in France, or the wider benefit of nocturnal dwelling-defence which exists - at least in theory - in both Scotland and England. What is more, the intruder would presumably be disabled, and we thus see why it is generally unnecessary for a deadly device to be used in an inhabited house, as significantly less force would still achieve the required result - personal or patrimonial protection, and the neutralising of the attacker.

And it is arguably not a valid criticism to point to the possibility that the device may fail to function, and so deny the owner his protection. For such protection is lost whether the device is set to discharge deadly or non-deadly force. Where it does, the question becomes irrelevant. But equally importantly, as regards property, such force is, unlike that

considered above, within the limits of proportion; for the price exacted by the owner is, it is submitted, reasonable, given the harm he is trying to prevent.

This aspect of non-deadly inanimate defence cannot be stressed too highly. For it completes, and satisfies the two major requirements which are fundamental to a successful plea in justification of private defence, namely that the riposte be both qualitatively (proportion) and quantitatively (necessity) commensurate with the gravity of the attack. Given particularly the alarming impotence of the police in face of the tide of offences against property, with very low clear-up rates in some areas for crimes such as burglary,³¹³ and given the massive increase in depredations against property of one kind or another, it is contended here that the law must concede (the word is chosen carefully) to the public some well-restricted, yet more than symbolic, powers for redressing the imbalance which is currently weighed heavily in favour of the criminal element.

The writer views with utmost concern the risk that society will ultimately adopt a defeatist or minimalist approach to combating criminality, given the tremendous odds which - in certain classes of offence - prevail against it, and he would seek to stress that neither the enormity of the problem nor the excesses to which some individuals are given in private 'defence' should as such deter the law from modifying its strictures according to the gravity of the situation before it³¹⁴ - private defence, it may be stressed, is one area of the law most needful of adaptation to social circumstances. It is this flexibility, incidentally, which will ensure that what is appropriate practice in say France in the 1980s is not necessarily held suitable for either England or Scotland in the same period. But just as milk-bottle crates are at last seen to be no proper defence for police officers in urban Notting Hill or Broadwater Farm, likewise it may be appreciated that the need to adapt the scope of society's 'concession of violence' to the individual may have to be graduated according to the circumstances prevailing at any given period.

A. The Conditions of Permissibility

We see here, however, that the direct/indirect argument is not absolute and does require some modification; for we must remember the uniqueness of this particular defensive situation - the victim is unable to be present and must rely upon an 'agent' to act in his place. This cannot be assimilated totally with normal private defence. Thus whereas, were he physically there, he might be able to measure his riposte with greater nicety, a slight leeway in the vigour of the riposte where he cannot be present should be permitted. Here the device is indiscriminating in its response and may perhaps deliver a riposte slightly more than that necessary or proportionate. But, it is submitted, society has ultimately to make a choice once again between the competing interests, and other than where the response of the device is patently disproportionate or unnecessary (as will virtually always be the case where the differentiated response is so great as to discharge inherently deadly automatic force), reason and equity demand that it choose in favour of private defence.

The fixed nature of the riposte is generally inherent in the use of booby-traps, and so where it is a case of either setting a mechanism which is not violent enough to be effective in its deterrence, or one which is effective, though slightly more serious in its violence than would normally be adjudged proportionate given the value of the property, the law should come down in favour of effective response, given particularly that such problems are forced upon the defender by the sole initiative of the aggressor. The latter should not be permitted to rely upon the general scruples of the law in order to ensure the consummation of his misdeed. Where, though, the difference is so great as to attempt to claim justification for deadly automatic force, then any latitude would not be permissible.

However, to benefit from this latitude, the owner should, arguably, take certain precautions in order to satisfy the necessity requirement. It is only reasonable to require him to place notice giving sufficient warning, for if the issue is deterrence then it is surely unnecessary to shoot someone when a suitably menacing notice might well have warded him off. Also,

any doors for example should be made secure, so that the owner may reasonably show that his defence was in the circumstances a last resort against a determined intruder, lesser measures having failed. ³¹⁶ And a crucial precaution obviously lies in the positioning of the device; given that the injuries inflicted are closely related to the height, angle and so on of the device, the manner in which it is deployed will have a great bearing upon whether the defender brings himself within the criteria of both necessary and proportionate force. Indeed it is no exaggeration to say that, to a large extent, upon the angle at which the device was set will depend whether X is condemned by the criminal law, or walks free from court an innocent man. Of great importance then is that the writer would not exclude the use of deadly weapons as such. What would be required is that they be deployed in such a manner as to make a fatal discharge most unlikely. ³¹⁷

This last point is well demonstrated by a major decision of the South African Court of Appeals in 1967, in the case of Ex parte Die Minister van Justisie: In re S. v Van Wyk. ³¹⁸ Van Wyk was the owner of a small store who had suffered greatly due to repeated burglaries at his premises. He attempted to counter this by using a guard dog and even employing a night-watchman, but to no avail. Nearing bankruptcy, he set up a shotgun in his shop, aimed to shoot any intruder in the legs, and placed a sign in both official languages notifying would-be burglars of its presence. An intruder subsequently broke in, and in the event sustained fatal wounds from the discharge of the shotgun. Van Wyk was subsequently acquitted on a charge of murder, on the grounds of private defence, which prompted the Minister of Justice to put the reference to the Appeal Court.

The five judges unanimously held that one might legitimately rely upon the doctrine of private defence where one killed or wounded to protect property; and by a three to two majority also held that in the particular case before it, the bounds of private defence had not been exceeded. The view which emerges from the majority judgements is that the defence of property could justify even intentional killing in some circumstances; but for our purposes what is presently important is that the facts were even more favourable to the defender. It seems clear that he did not have any intention to kill, and this appears not to have escaped the attention of the Court. Nor, as was pointed out by one Justice ³¹⁹ had it been proved that

in the absence of any intention, Van Wyk had been negligent in respect of the death. With the principle which the Court seems to have espoused here, the writer would respectfully, if cautiously, concur.

B. Non-explosive Devices

With this last point especially in mind, one may compare such devices with the use of iron spikes, or broken glass on the top of perimeter walls, 'devices' which in a passive and forbidding manner offer their own particular form of dissuasion. Some commentators attempt to distinguish the two, ³²⁰ while others earnestly maintain that there is absolutely no difference between them, and thus argue that to reject spring-guns is also to repudiate the common law principle that one may use such traditional means to protect one's property. ³²¹

It is submitted, however, that many of the arguments are at cross-purposes, for they often fail to distinguish between different types of passive device. Just as deadly force devices are and should be generally inadmissible, so too should spikes and other instruments so deployed or confectioned as to present an inordinate and calculated risk of lethal injury to an intruder - and indeed criminal liability should ensue from their mere setting. ³²² But where the glass or spikes are not inherently barbaric in nature then whatever the jurisdiction, they would and should be permitted; ³²³ just as a shotgun fired at the head cannot be compared with an injury to the shins, neither can a broken beer-tumbler thrust in someone's face in a bar be compared to a cluster of glass embedded in concrete on a wall. This self-same principle indeed applies also to the use of guard dogs or other animals, ³²⁴ and the correct position in law was in the writer's opinion caught by Lord MacKenzie when speaking in the case of James Cran he said:

"But let us suppose that the ditch is contrived to drown, that the dogs are trained to tear persons to pieces, and kept for that purpose - that the spikes on the wall are poisoned. In all, or any of these cases, it would be murder." ³²⁵

C. The Risk to Innocents

Finally, as regards the risk to innocents, we have seen that in some respects, so far as deadly force is concerned the question is really a collateral issue once one accepts that such devices per se are illegal. But where devices are considered legal, as contended here for non-deadly instruments, the focus does shift. A high degree of care should, it is submitted, be required in the preparations surrounding the posing of the engine, regarding notice and the securing of doors for example. And certainly, the owner should be civilly - if not criminally - liable if he failed, say, to warn his house guests as they retired, to exercise great caution should they have cause to rise during the night.

But there are always risks in the exercise of private defence, - and no criminal liability will attach where, say, a stray bullet kills or injures an innocent third party, unless the force was employed in such a manner as to imply a wanton disregard for the safety of others. Here, the killing of the attacker is not even envisaged, as it might be in some direct self-defence situations, and its likelihood is all but excluded; here we impose restrictions based on necessity, again of 'benefit' not only to any would-be intruder, but to protect the innocent; and furthermore it is arguable that given the ease with which one may innocently trespass upon land, then whatever the value of cows, or deer, say, which may be found on it, automatic devices should never be permitted, and should be restricted to actual buildings, where an intruder's intentions are less ambiguous. Ultimately though, in this continuing balance of interests, so far as the criminal law is concerned then arguably those of the property-owner should prevail over innocents in the circumstances set out above, just as with intruders, and it is the writer's contention that the following words of two commentators, speaking earlier this century and referring to civil law are equally, if not more accurately, applicable within the criminal sphere:

"In such a case the defendant is not liable to a third party whom he does not intend his self-defensive act to affect unless under all the circumstances he should realise that his act creates not only a probability, but an undue one, of causing harm to the third party."

It is not enough that the means of defence creates some such probability. The probability must be undue." 326

D. Conclusion

What of the law ? In Scotland one may draw encouragement from the fact that the judges in James Crow all expressed their opinions in relation to spring-guns which killed. However, the case was decided some one-and-a-half centuries ago, and given the generally restrictive tenor of present-day Scots law on the matter, it seems more than doubtful whether such a practice would be considered justifiable. As for England, it is more than likely that such devices would fall under the legislation which prohibits the setting of instruments calculated to destroy human life or inflict grievous bodily harm, and outwith the proviso of section 31; it would therefore seem probable that the setter of such an instrument would be hard pressed to secure a justification for his actions, especially if it were to injure someone.

In France we have the decision of the *Cour d'appel d'Amiens* in 1965, mentioned earlier, 327 which seems exactly in point, with exemplary care and precautions being exercised by the owner in question. All subsequent caselaw, significantly, involved breaches of either the necessity requirement, or proportionality, or both - or were complicated by the fact that the charges laid related to 'involuntary' offences, which, since the landmark decision of the *Cour de cassation* in Cr 16 février 1967 (Cousinet) 328 have in some instances made it difficult for an accused to raise successfully a plea of private defence; and so the juridical isolation of the Amiens decision is more apparent than real.

But a recent decision of the *Cour de cassation* 329 considered the issue, where the Court rejected the *pourvoi* of a man whose spring-gun shot a luckless hitch-hiker who had sought entry around 3 a.m. into his sheep-pen to sleep, and was injured by a shotgun blast fired automatically. The judgement is highly equivocal, for it rests largely upon the fact that the conditions of Article 329(1) were not satisfied in the circumstances, and furthermore no notice had been given. Also, we have no indication of the

nature of the injuries sustained by the intruder, and it is therefore impossible to gauge the view of the courts on the question of proportion. It has been commented though that the restrictive scope of the judgement is in fact very limited ³³⁰ - but until we are confronted with a *pourvoi* to the *Cour de cassation* similar to that of the Amiens case in 1965, which of course went no further than the *Cour d'appel*, then the state of the law in France remains unclear. Nonetheless, it is the present writer's contention that were such a case to arise - and such an eventuality can by no means be ruled out for the near future - the signs are that the *Chambre criminelle de la Cour de cassation* would be disposed to decide in favour of the accused, thus asserting its determination to affirm a limited, yet nonetheless effective, protection of the personal and patrimonial integrity of individuals, and at the same time redress the somewhat restrictive view of the limits of private defence which have prevailed in some courts in the post-war era.

IV CONCLUSION

If one thing may be said of the law of the defence of property in its various forms, it is that it is characterised by such ambiguity that one may find in it supporting evidence for totally opposing opinions on the degrees of force permissible in differing circumstances. Certainly, a special protection continues to be cast around the dwelling house, as a place of refuge, but it is ironic to note that, if anything, the country of "castles" was *not* England, but France where, at least in the nineteenth century, homeowners were accorded an immunity far beyond that which openly prevailed this side of the English Channel - one cannot equate the decision in Scully and in Meade & Belt with the unforgettable judgements rendered, *inter alia* in Braquet and Casabonne. ³³¹ The inclusion of arson as grounded in reasons of personal security may have been predominant in the olden days, but in a twentieth-century interventionist state, this argument loses much of its force; yet there is arguably every reason for the retention of the rule, simply on the grounds that the value at stake is so great, and the crime so 'atrocious' as to justify serious violence - including homicide - in its prevention.

And it is this issue of prevention of crime which, along with that of arrest, hovers in the background to render most difficult all attempts to discern the precise contours of any defensive right based purely on the protection of property. In England the passing of the Criminal Law Act 1967; in Scotland the generally restrictive aura which hangs around the few statements on private defence; the relative scarcity of modern caselaw; the rigid firearms control we now have; the grey area with crime prevention and arrest - all these contribute to produce much doubt on the true state of the law. Certainly, though, the strict attitude towards force used against mere trespassers is entirely justifiable and provides much-needed safeguards against unnecessary violence. And where more serious invasions are concerned, one has the impression that courts prefer to apply the law in a case-by-case manner - frustrating perhaps for academics, but arguably necessary if one is to effectively minimise abuses of the right to use violence in given situations, yet also do justice in the individual case.

France has faced such problems more directly than either Scotland or England, partly as a result of more liberal firearms legislation. The repudiation of nineteenth century principles is only to be welcomed; but the manner in which it was done is not entirely beyond criticism, and it is respectfully suggested that a declaration by the *Chambre criminelle* affirming in less equivocal terms than those of *Reminiac* the prime value to be accorded to the security rights of citizens faced with an unlawful invasion by night, is long overdue.

With the defence of moveables also, for example, it is difficult to separate danger to property from danger to person. Consequently, most examples cited deal with robbery and so, as with cases involving night intruders into dwelling-houses, comment and speculation as to the true state of the law is, to a great extent, freely open to all, until the courts are presented with a 'classic' scenario of serious force employed purely to protect a patrimonial interest other than a dwelling. Leaving aside the case of what were once called "forcible felonies" in England, one may only doubt whether a court would be well-disposed towards someone who killed in such a situation, but the contention here is that, on balance, one cannot rule out in absolute terms the use of deadly force where an attack on personal property which does not simultaneously threaten danger to the owner is at issue. No

court has really declared this to be so, a fact which may not be so much due to the unequivocal rejection of such an eventuality, as to an understandable reluctance to speculate on matters not directly relevant to the case before it, especially given the natural human tendency - so hazardous particularly in the field of private defence - to assume that what is conceded by the law is by the same token actively encouraged. 332

Again it is in France particularly that the courts have had to tackle another special problem of private defence, relating to the use of automatic devices as substitutes for personal action, especially in the field of property-defence. It has been argued here that objections to their use *per se* are unfounded, and that the restrictive view taken on both sides of the Channel towards them demonstrates a concern for the abuse of the proportionality rule with which they are frequently associated, rather than any outright rejection of automatic defence as such.

It is contended therefore that while the use of deadly devices can only very rarely be sanctioned, the setting of instruments capable of triggering an effective and possibly serious - but not inherently life-threatening - response, and the subsequent operation of these instruments, may be justifiable. Where they are surrounded by rigid precautions as to the necessity requirement, this would constitute an effective and justifiable substitute, imposed by force of circumstances, for the more normal personal intervention by an owner, his actions furthermore only being considered justifiable by virtue of society's failure to assure the efficient social protection from criminal behaviour which it so earnestly seeks to achieve.

To those who would argue that the proposals of the present writer do not go far enough in ensuring the protection of property-owners and their goods, one may reply that whereas the cult of property is an 'ideal' which all are within their rights to pursue, ensuring the private enjoyment of property-owners is not the sole pre-occupation of the criminal law, and in no way warrants the total disfigurement of the traditional rules of private defence, into a system based solely upon the principle of autonomy and necessity. Whatever the private interests of some, the law continues - rightly - to differentiate largely between the value of interests in physical

integrity and those in one's patrimonial well-being, and consequently between the gravity which attacks upon either represents.

To those, on the other hand, who would object to the suggestions as being unreasonably rigorous, the writer would, with respect, point out the following: firstly, insofar as inherently deadly force in the protection of property is concerned, the situations where this would be considered justified would certainly be infrequent, indeed exceptional. Having said this, though, one would wish to affirm the principle that in such situations the use of deadly force against, for example, a fleeing thief would, if necessary in the circumstances, be an act not merely excused in law, but *justified by it*. The infrequency of its application does not deny the existence of the principle. And secondly, many of the thoughts here expressed have concentrated upon situations where in addition to property, human lives and general physical safety are imperilled, and it is the writer's contention that in some of the situations described, particularly fearful for potential victims, then the aggressor, having chosen the locus or character of his attack must accept the consequences of his decision. And where these consequences are, *inter alia*, the difficulty for the victim of accurately and objectively gauging the severity of the attack, in conditions which simultaneously suggest the worst and cripple most ruthlessly his ability to stay calm, then, if it is between the possibility of harm to the defender, and the certainty of harm - in fact very serious harm - to the attacker, it is submitted that the defence must indeed be certain.

APPENDIX

1. Cf. Robinson, P.H. *Criminal Law Defenses*, St. Paul, Minn. 1984 vol.2 p.70.
2. "...a justification of a battery in defence of possession, though it arose in defence of the possession, yet in the end it is the defence of the person." 1 Rolle's Ab. Trespass G8. C.f. Stephen, *A General View of the Criminal Law of England*, 2nd ed. 1890 p. 123; Dicey, A.V. *The Law of the Constitution* 8th ed. 1915 p. 493; Lanham, D. *Defence of Property in the Criminal Law* (1966) *Crim.L.R.* 368, 373; Stuart, D. *Canadian Criminal Law*, Toronto, 1982 p. 402.
3. Though the word "thief" is often used, what the texts actually referred to was a burglar.
4. Potter. Antiq. b.1.c.24, quoted by Stephen, *New Commentaries on the Laws of England* (1845) vol.IV p. 100; also Demosthenes adv.Aristocr. p.436c, quoted, *inter alia*, Pufendorf Book II, Ch.V,16 fn.5
5. Exodus 22:2 "If a thief is caught breaking in and is struck a mortal blow, there is to be no blood-vengeance for him, but there shall be blood-vengeance for him if it was after dawn" The Jerusalem Bible, London (1966)
6. VIII, 12, *si noctu furtum fiat furem autem aliquis occiderit, impune esto* (Chauveau et Hélie); *si nox furtum faxsit, si im occidit, jure caesus esto* (Laingui, A. *La Responsabilité Pénale dans l'Ancien Droit*, Paris 1970 p. 277)
7. Grotius, Book II Ch.I no.XII (1)&(2)
8. Pufendorf, Book II Ch.V no XVIII; c.f. Grotius, Book II Ch.I no.XII. See also, in support of Pufendorf, the argument by Barbeyrac in Grotius, *supra*, fn.8
9. This last one then is the position adopted by Grotius Book II Ch.I no. XII, while Pufendorf prefers the interpretation favouring the flat permission to defend or recover one's goods. In support of his theory, Pufendorf does cite two further compelling reasons. Firstly, he states that the fact that killing was permitted even during the day where the thief defended himself with arms shows that one could commit homicide to defend property itself, for here the thief was on the defensive, using his weapon only to repel the owner who wished to recover the goods. The reasoning, however, is by no means conclusive, for one easily appreciates the enormous subtlety between resistance and defence and the extent to which each implies an offensive nature. Secondly, regarding the biblical text, he argues that were Grotius correct in his reference to the thief being found "with a piercing instrument", one could well ask why the text simply did not say "with a weapon", to signify the danger presented by an armed thief. The debate appears to centre partly around the Hebraic word "*hammahhtereth*", which Jean de Barbeyrac, the French translator of Pufendorf, approvingly interprets as "*en perçant*" ("while piercing") thus allowing mere entry for theft to suffice. See also, in support, Jeremiah 2: 33-34.
10. *Lex duodecim tabularum furem noctu deprehensum occidere permittit, ut tamen idipsum cum clamore testificetur*, Bk 4 Dig. ad leg. Aquil.c.f. Chauveau et Hélie, *supra*, p193. Also Bk.48, 8 Ad. legl. Cornel. de

sicariis. Although authorities are not unanimous on the matter, it does appear that the original rule contained no such restriction, and was added later, although the circumstances of its addition are not clear; cf. Laingui, *supra* p. 279 fn. 106; cp. Chauveau et Hélie *supra* p. 193; Grotius Book II Ch I No XII, 3, footnote 11 by the translator.

11. *Furem nocturnum si quis occiderit, ita demum impune feret; i parcere ei sine periculo suo non potuit.* Digest Book 48 Title 8, Ad legem Corneliam de sicariis, Law 9. D. Bk. 9, title 2, Ad legem Aquiliam Law 4.
12. Cf. Laingui, *supra*, p. 278. Not surprisingly though, the position now adopted by, *inter alia*, Laingui, was keenly resisted by some ancient writers on many fronts. For in addition to any arguments regarding textual inaccuracies, writers such as Barbeyrac argued that if direct defensive killing were not permitted, then it should logically follow that one might not oppose the thief with any force at all, such as might eventually result in a situation where the owner was obliged, by escalation of the combat, to kill the thief. However, the present writer does not see that the two are inextricably linked, unless one holds every defender causally responsible for the ferocious counter-riposte of his (unlawful) initial aggressor, and for the ensuing events.
13. For a hypothesis as to the reasoning behind such modification see Barbeyrac's comments in Pufendorf, Bk II, Ch V Title XVII fn. 1. The entire question of the jurisprudential significance of the modifications to the Twelve Tables is strikingly reproduced in the inquiry as to the position in jurisprudence of the landmark decision of the *Cour de cassation* on 19th February 1959, (Reminiac) interpreting Article 329(1) of the *Code pénal*.
14. It will be appreciated that part of the problem stemmed from the fact that self-defence was habitually (and still is sometimes) considered in treatises under the rubric "homicide". The two concepts of deadly force defence and non-deadly defence should, although to some extent interlinked, be considered separately. It is more or less certain that one could use non-deadly force to protect one's property under the Ancien Droit, and in ancient times. Cf Pufendorf Bk. II, Ch. V, No. XVIII, and Laingui, *supra*, p. 273. Ironically, as we shall see, in France the whole issue of defence of property as such gave rise to much controversy following the enactment of the *Code pénal*.
15. *Les Loix Criminelles de France dans Leur Ordre Naturel*, Paris 1780 p32; *Institutes au Droit Criminel*, Paris 1757, pp. 9 & 10. Also, Soulatges, *Traité des Crimes*, Toulouse 1762 vol. 1, p. 394 placed defensive force firmly within the same sphere, stating that the night rule was due to the fact that the intruder's intentions would be unknown.
16. From the text of the "Institutes" of Muyart de Vouglans, we may infer that he saw the presumption of breaking and entering as open to rebuttal by his inclusion of the word "violence"; as to the presence of an intruder in one's chambers, might it not be reasonable to infer that, ideally, Muyart would view this too as rebuttable, although in practice this would be purely hypothetical, for one would naturally be inclined to react instantly on waking to find an intruder so close and at such an hour. However, the text is modified in his treatise of 1780 to speak merely of a nocturnal thief.

- 17 *"On peut même user d'artifice pour prendre les voleurs de nuit, ou pour les faire périr; soit en leur tendant un piège pour les faire précipiter, ou usant d'autre artifice semblable." Traité de la Justice Criminelle de France, Paris 1771 p 501.*
- 18 Jousse, *supra*, p 501.
- 19 Interestingly, he allows a quasi-subjective view of the notion of value: *"ce qui peut dépendre des circonstances et de l'état des personnes volées."* *supra*, p 501.
20. However, the necessity rule did appear to apply only where the night thief used no force; where he did show any violence, presumably, the owner could kill with impunity. Interestingly, whereas Serpillon cites the importance of the intruder's intentions being unknown, to support the night rule (ie one is not sure whether he comes to kill or steal, in which latter case the right to kill would presumably not accrue) the fact that the intruder is a potential assassin or thief appears to be of little import to Jousse, who states (p. 501): *"...mais il faut que ce soit à son corps-défendant, ou pour la défense de son bien; ce qui est toujours présumé lorsqu'un voleur veut entrer de nuit dans une maison; parce qu'on a alors raison de penser qu'il vient pour tuer, ou pour voler."*

The relevant passages do lend support to the theory that the night rule was indeed formulated in order to protect the property as well as the person of the owner, and there is a clear understanding that the power of arrest, for the bringing of the offender to justice, is seen to be relevant. Cf, on the point of the difficulty of recovering or protecting the goods at night, Grotius Bk. II Ch. I no. XII fn. 8 (Barbeyrac).

21. At one point du Rousseaud de la Combe suggests that where the thief used no force in entering, and made off without any goods it would not be lawful to kill him; while later he states that the night rule was based on the hidden nature of the intruder's intentions; hence the rule on crying out, which took on a new significance: *"si lorsqu'on crie au voleur ou à l'aide, le larron prend la fuite; auquel cas paraissant qu'il n'avait qu'intention de dérober, on ne le doit pas poursuivre pour le tuer. Mais si après tel cri il demeure ferme, il est à présumer qu'il a conçu le meurtre dans l'âme."* Yet soon after, he states that the right to kill does not extend to the defence of items of little value, such as pears, apples, nuts, grapes etc (p 82), which again suggests that one look at it in isolation from personal danger.
22. It is in this light that one may interpret the ubiquitous term, *"défense de soi-même et de ses biens"* and other such expressions often found in the writings.
23. Or his servants acting in his absence; Serpillon, *supra*, Title XVI Art. II no. 19.
24. It is submitted that the remarkable declaration by the drafters of the Model Penal Code that dwelling-defence is a purely property concept (MPC, Tent. Draft No. 8, 1958) should not be followed; while in some cases this may be so, in the vast majority, most notably when the

building is occupied, this is certainly not the case. The writer therefore fully agrees with Perkins & Boyce, *Criminal Law*, 3rd ed., Mineola, NY (1982) p.1153 in their criticism of the above proposition.

25. *R v Meade & Belt* (1823) 1 *Lew.C.C.* 184; cf. Stephen, *General View*, *supra*, p. 123; *Clack v State* 196 So. 286.
26. This in essence is the objection voiced by Robinson, *Criminal Law Defenses*, *supra*, p. 111; however, the writer cannot go along with his (tentative) suggestion that perpetuation of the distinction between types of property might reasonably be abandoned, for the existence of significant abuse to justify this is arguably not yet evident.
27. (1604) 5 Co. Rep. 91a. The precise wording is in fact "...the house of every one is to him as his (a) castle and fortress...". Cf *R v Meade & Belt* (1823) 1 *Lew.* 184.
28. Low, J. in *Law v State* 318 A 2d 859 (1974), quoted La Fave p. 349, an assertion which is, on the whole, applicable to the law on both sides of the Atlantic.
29. The same point is put, though in a different manner, by Lanham, D. *Defence of Property in the Criminal Law* (1966) *Crim. L. R.* 368, 369.
30. Institutes, 3rd part, p. 220 (he also mentions burglary, which will be treated separately, *infra*).
31. A Treatise of Pleas of the Crown, Book 1 (1716) p. 71
32. A Treatise of the Pleas of the Crown, Vol. 1 (1803) p. 271.
33. Cf. Coke, *supra*, pp. 2201; Hawkins, *supra*, pp. 71 & 70
34. Or, at least, whatever the correct interpretation of that term among those offered by the various writers, it brought the killing outwith the class of what one might term quarrel private defence, where, though the accused succeeded in his plea, a certain measure of blame was imputed to both parties in the altercation.
35. Coke, *supra*, p. 220; 24 Hen. c. 5, which expressly referred to robbery, murder and night-time burglary. The forfeiture of "goods and chattels" reflected the common law's condemnation of the slight element of blame it actually seemed to assume present in cases of 'normal' private defence.
36. See e.g. East, *supra*, p. 289; *R v Ford* (1664) *Kel.* 51. On the general question of retreat, see *supra*, chapter 2.
37. Hawkins, *supra*, p. 71; c.f. East, *supra*, pp. 271, 272.
38. *Supra*, p. 71.
39. E.g. Hale, *Pleas of the Crown* p. 487; Stephen, *New Commentaries on the Laws of England*, Vol. IV (1845) p. 99; Perkins & Boyce, *supra*, p. 1150; Garçon, *supra*, Article 328, no. 57; Hume, *Commentaries*, *supra*, p. 220.

The writer further agrees that the offence, insofar as we are speaking of its capacity to justify a homicidal response, should not be interpreted strictly; and therefore Perkins's and Boyce's reference to destruction "by fire, explosion or in some other manner" is preferable.

40. At least not in England. A reading of Hume (I, p. 220) would appear to require that the defenders be inside.
41. Viewing things this way, the writer disagrees with Peter Heberling (*Justification: The Impact of the Model Penal Code on Statutory Reform* (1975) 75 Col. L.R. 914, 944), where he says: "Any rule based solely on the interference with a possessory interest in a building, however, has little justification if it fails to condition the use of deadly force on the probability of the building's occupancy." Quaere, if X owned several houses in different parts of the country, and a group of ruffians sought to destroy one of them, while he was riding up from his town house. What position would have been taken if he drew his pistol and shot one of them?
42. (1823) 1 Lew.C.C. 184.
43. *Id.* at 185.
44. In the event the jury found Mead guilty of manslaughter, and acquitted his co-defendant.
45. (1961) 45 CAR 348.
46. *Id.* at 352.
47. (1967) 131 J.P.N. 723, mentioned Williams, Textbook, *supra*, p. 502 fn. 9.
48. Coke, III, p. 220; Blackstone, Commentaries on the Laws of England, *supra* 204; Stephen, *New Commentaries*, *supra*, p. 99.
49. Cf. Perkins & Boyce, *supra*, p. 1152 (Illustration 2).
50. Hume, Commentaries, I, pp. 220-1. C.f. Skene, *Regiam Majestatem* (1609); also, Scots Act 1661, c. 217.
51. Evidently, this is one important point which will vary from one period and one jurisdiction to another. A home-dweller will generally have greater reason to fear the presence of an armed intruder in Florida than in say, Portree. This must not be forgotten, and has a great bearing upon the suitability or otherwise of a rigidly set presumption of danger.
52. Cf. e.g. *S v Barr* 11 Wash. 481, 487, quoted Lanham, D., (1966) Crim. L.R. 368, 370: "It is common knowledge that burglaries (of dwelling-houses), often result in the death of some of the inmates of the dwelling upon which the burglary is committed and for that reason it might well be held that a burglary of that kind could rightfully be prevented by such means as might result in death."
53. Commentaries, I, p. 220; see also Lanham, D. (1966) Criminal L.R. 368, 369: "When the householder finds himself in the presence of a burglar

in the still of the night, his position is exactly the same as it was for his nineteenth, eighteenth or even sixteenth century ancestors. The police force is of no service. Even if he has a telephone, the noise made in operating it will probably alert the burglar, who may well be of a violent disposition. The householder knows that he must make the choice between attempting to arrest or scare off the burglar ... and attacking the burglar first, without warning and possibly by inflicting death, thus ensuring the safety of himself and his family."

54. (1639), cited in Cook's Case (1639) Cro. Car. 537, 538.
55. Note that the accused advanced voluntarily into the darkness, in a posture more offensive in immediacy, though probably defensive in its overall context. The case is, of course, also good authority for the plea of putative self-defence. See *supra*, chapter 1.
56. Cro. Car 544.
57. See also R v Frankum Times May 11, 1972. And on the question of at what moment serious defensive force becomes permissible, it is submitted that equally commendable are the words of Hume, when he states "Nor is it necessary that the man have carried his assault so far, as clearly to show which of these several felonies he had in view. It is sufficient that he has entered the house, or has broke the safeguard of the building..." Commentaries, II, p. 220; Compare the attitude taken in France in interpreting the terms of Article 329(1), *infra*.
58. "Forasmuche as it hath ben in question and ambiguytie, that if any evill disposed psone or psonnes doo attempte felonouslye to robbe or murder any psone or psones in or nygh any comon highway cartway horseway or fotewayes, or in their mansion mesuagies or dwelling places, or that felonously do attempte to breke any dwelling house in the nyght time, shuld happen in his or their beyng in their suche felonous intent, to be slayne by hym or them, whome the said evill doers shuld so attempte to robbe or murder, or by any psone or psones being in their dwelling house which the same evill doers shuld attempte burglarly to breke by nyght, if the said psone so happenyng in such cases to slee any such psone so attemptyng to comitte suche murdre or burglary shuld for the death of the said evyll disposed psone forfait or loose his goodes and catalls for the same, as any other psone should doo that by chaunce medeley shuld happen to kill or slee any other psone in his or their defence; For the declaration of the which ambiguitie and doute, be it enacted by the Kinge our Sovraigne Lorde with the assente of the Lordes Spuall and Temporall and the Comens in this psent pliament assembled and by auctoritie of the same, that if any psone or psones at any tyme hereafter be indited or appealed of or for the deathe of any suche evill disposed psone or psones attempting to murdre, robbe or burglarly to breke Mansion houses as is above saide, that the psone or psones so endited or appealed thereof and of the same by vdicte so founde and tried, shall not forfait or losse any Landes Tenementes Goods or Catalles for the death of any suche evill disposed psone in such man slayne, but shall be thereof and for the same fully aquited and discharged, in like man as the same psone or psonnes shuld be if he or they were lawfully acquitted of the deathe of the said evyll disposed pson or psones."

59. *Rex. v Scully* (1824) 1 Car. & P. 319.
60. *Supra*.
61. In 1811, Kenny tells us (Outlines, p. 143, fn. 4), a Mr. Purcell was knighted. This Irish septuagenarian received the honour for having dispatched four burglars with a carving-knife.

Two other incidents are of great interest. Firstly, see the report of the Coroner's inquest into the death of one Ellis, Times 15th July 1789, where a verdict of self-defence was returned. Ellis was killed by his neighbour (and former friend) on seeking to enter surreptitiously the latter's house to see his killer's young sister. The two had previously exchanged words over his interest in the girl. with the latter at the time. Secondly, the writer here reproduces the famous passage from the Saturday Review of 11th November, 1893, cited by several commentators: "Mr. Justice Willes was asked, 'If I look into my drawing-room and see a burglar packing up the clock, and he cannot see me, what ought I to do?' He replied, as nearly as may be, 'My advice to you, which I give as a man, as a lawyer, and as an English judge, is as follows. In the supposed circumstance, this is what you have a right to do, and I am by no means sure that it is not your duty to do it. Take a double-barrelled gun, carefully load both barrels, and then, without attracting the burglar's attention, aim steadily at his heart, and shoot him dead.'"

62. Hume, *Commentaries* (1830) I, p. 220 fn. 2.
63. Indeed, the case seems even less out of context when considered in conjunction with that of *Edward Lane* (1830) Bell's Notes 77, which appears to give great latitude to the possibility of force used against a house-breaker. Here, deadly force was used against a fleeing housebreaker. It is submitted that the aspect of "personal violence" in the case, adverted to by Gordon, (p. 753) is not adequate to explain the decision.
64. (1966) *Crim. L.R.* 368, 369.
65. *Commentaries*, supra, p. 221: "...in this, as in every other inquiry in criminal matters, consideration must always be had of all the circumstances of the situation. And that one on whom an attempt is made to rob him in the open air, or whose house is feloniously attacked, to rifle or burn it, or to commit a hamesucken on him; - that such a one is obliged in any case, or at any hour, rather to suffer this great wrong, which the law punishes with death, than to hinder it, if he can no otherwise, by killing the invader; or that the law has received any presumption so contrary to the truth, as that this cannot be necessary against any attempt in the day-time: All these things are neither reasonable in themselves, nor any wise analogous to the rest of our practice."
66. Hume's sentiments do in fact receive direct support from a reading of East, *Pleas of the Crown*, vol. I pp. 272-3, where, commenting upon Stat. 24 Hen. 8 c. 5 he says: "And though it only mentions the breaking the house in the night time; which I conceive must be intended of such a breaking as is accompanied with a felonious intent; yet a breaking in the day time with the like purpose must be governed by the same rule."

67. Sometimes "violence and surprise" is used as an alternative; cf. Law v State 21 Md. App. 13, 318 A. 2d. 859 (1974).
68. Hume, supra, vol. I, pp. 219-220: "...if it is made in that forcible and felonious manner which naturally puts the owner in fear."; East, supra, p. 271: "...endeavours, by violence or surprise, to commit a known felony" (original emphasis); Blackstone, supra, p. 180 "...any forcible and atrocious crime..."
69. Criminal Law Act 1967, section 3.
70. Pickles, J, "Today" BBC Radio 4 UK, 18th November 1986.
71. (1961) 45 CAR 348.
72. (1967) 131 J.P.M. 723.
73. Times, May 11, 1972.
74. (1950) J.C. 67.
75. Supra, p. 762.
76. (1664) Kel. 51.
77. For an American case, see the famous decision in People v Batman 405 Ill. 491, 91 N.E. 2d 387 (1950).
78. (1824) 1 Car. & P. 319.
79. Commentaries, supra, I, p. 220.
80. Supra.
81. Compare this with the notion in French law as defined by Article 329(1), infra.
82. Cf. Wharton, Criminal Law, supra, no. 129 and cases cited therein.
83. 40 Corpus Juris Secundum, no. 109b; the Canadian Criminal Code defines a dwelling-house as the "whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence." Cf. Stuart, Canadian Criminal Law, Toronto (1982) p. 403.
84. State v Borwick 187 N.W. 460, 193 Iowa 639, quoted 40 Corpus Juris Secundum no. 109b.
85. E.g. U.S. v Gilliam (1882, D.C.) 25 Fed. Cas. 15205a.
86. Infra; c.f. Bohlen, F.H. & Burns, J.J. *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices* (1926) 35 Yale L.J. 525, 543 fn. 49: "One of the methods which courts have used in extending the privilege to kill for the protection of property is by liberally construing the word 'dwelling'..."; Speziale, M.J. *Is A House A Castle ?* (1976) 9 Conn. L.R. 110, 120 fn. 43: Speaking of the wide notion of habitation revealed in one case, State v Moore 31 Conn. 47a (1863), she

says that the case "...is symptomatic of the fact that American courts have stretched the principles applicable to houses and extended the privilege to kill in the name of property." While the present writer would not necessarily object to the inclusion of some of the above, he does share Speziale's apparent concern over the seemingly arbitrary extension of the notion of the dwelling-house, and the consequences of such an approach.

87. Perkins & Boyce, *supra*, p. 1151; Howard v Commonwealth 120 SW 2d 212, 274 Ky. 653; Stanfill v Commonwealth 272 SW 1, 209 Ky. 10; Sparks v Commonwealth 20 SW 167, 89 Ky. 644; State v Laura 116 SE 251, 93 W.Va. 250.
88. State v Smith 100 Iowa 1, 69 NW 269 (1896).
89. Where, of course, it is distinct from one's own house, which is not always the case. There the normal rules would apply. Cp. Toulouse, Ch. Acc. 10 octobre 1972.
90. (1984) 1 All E.R. 988.
91. The relevant passage is found p993: "For these reasons the point of law referred by Her Majesty's Attorney General for the consideration of this court is answered by saying: the defence of lawful object is available to a defendant against whom a charge under s.4 of the 1883 Act has been preferred, if he can satisfy the jury on the balance of probabilities that his object was to protect himself or his family or his property against imminent apprehended attack and to do so by means which he believed were no more than reasonably necessary to meet the force used by the attackers." Note the use of the word "or".
92. Indeed even the early cases call into question such an assumption; if general security is at issue why does dwelling defence apply to a place where one merely spends one's working hours? If the retention of one's home is the case, why may the occupancy of a mere room in a tavern suffice (R v Ford)? Indeed, since apparently the right of defence may be exercised by a mere guest of the actual owners, does this not most urgently beg the question of what the basis of the rule is: is it because I am acting in my own right as an occupant of the house (subjective view) or because I am acting on behalf of my host, to protect him and his house (objective view)?
93. (1924) 18 CAR 160.
94. Lanham, D. (1966) Crim.L.R. 368, 372; Williams, G. Textbook, *supra*, pp. 519-20.
95. See also Stephen, *Digest of the Criminal Law*, *supra*, p. 254.
96. Insofar of course as we are speaking of an eviction attempted under a misapprehension of one's legal rights, as in Hussey. Cf. Williams, Textbook, *supra*, p. 520: "Nowadays it is virtually unknown for anyone to be evicted from a dwelling-house except by someone who thinks he has some sort of right to do so, and public policy pretty clearly indicates that the occupier should have no right to use extreme force against such an evicter even though the eviction is illegal. Abolition of the

right to shoot to avoid eviction would not affect the right to shoot by an occupier who fears that the attacker will inflict death or serious injury on him."

The writer fully approves of this last qualification, for even where the eviction is *prima facie* lawful, obviously, the right of self-defence should re-enter the moment unlawful excessive force is used against the evictee. For recent confirmation of this, see Barrett & Barrett (1980) 72 CAR 212. This is the position which is, at first sight, also adopted by Lanham, *supra*, p. 372, but it will be seen that he goes even further. He says: "In *R v Hussey* it was held that 'in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might by law kill in self-defence a man who attacks him personally...There seems to be no valid reason why a distinction should be drawn between dispossessors and other forcible trespassers and *R v Hussey* must be regarded as out of line with the older and more humane authorities. Certainly in an era when the sanctity of life takes precedence over the sanctity of possession, *Hussey's* case makes strange reading." It would seem then that Lanham applies the same reasoning to those who would dispossess even with no claim of right. It is with this assertion that the present writer respectfully takes issue; see *infra*.

97. Williams, *Textbook*, *supra*, p. 520: "The more difficult legislative question is whether there should be a right to shoot to avoid unlawful eviction by one who is known, or believed, not to be acting under a claim of right. The problem rarely arises in practice, if only because of the difficulty of getting a gun licence. Still, some people have guns; and if a man may shoot to prevent a burglary, as almost certainly he may, it would seem to follow that he can shoot to avoid being turned out of his house. A man, said Cardozo J., 'is under no duty to take to the fields and the highways, a fugitive from his own home.'"
98. See Dicey, *The Law of the Constitution*, 8th ed. (1915), pp. 489-90.
99. See Dicey, *supra*, pp. 489-90 for his recitation of, and comment upon the case - a perfect example, incidentally, of the clarity and precision which so characterised his writings. C.f. *Rex. v Scully* (1824) 1 Car. & P. 319
100. Cf. *supra*.
101. I Hale pp. 445, 485-6; East, *supra*, pp. 271, 287; Hawkins, *supra*, p. 72; Stephen, *Digest*, *supra*, p. 254; Hume, Vol. II, *supra*, p. 219.
102. *Supra*, p.72.
103. *Infra*, chapter 6.
104. Commentaries, I, 219: "As little does the force seem to be sufficient, if it is not of a felonious nature, but a trespass only, or misdemeanour. A few instances will illustrate this matter. Put the case, that a rabble of boys assemble before a man's house, not to enter it, but to raise a riot and insult him only, or at most to throw mud against the door, or break his windows: He is not justifiable, it may not be even excusable, if in resentment of this indignity he straightway sally out

and fire on the trespassers, or stab and kill with a lethal weapon."
(original emphasis)

105. Hume, *supra*, p. 219. He continues: Again, it is not lawful for me to kill my neighbour, who persists to search for game on my lands without my leave." In James Craw (1827) Syms 188 & 210, the prosecutor cited this to support the indictment for murder, but it will be noticed that, even apart from the fact that the quotation follows immediately after the passage cited above, there is nothing in the text specifically pointing to murder as the proper charge.
106. Williams, Textbook, *supra*, p. 520; c.f. People v Black 141 NE 170, 309 Ill. 354.
107. Stephen, *A General View of the Criminal Law of England*, London (1890) p. 123. Rex. v Scully (1824) 1 Car. & P. 319; R v Meade & Belt (1823) 1 Lew.C.C. 184; Oakes v Wood (1837) 2 M. & W. 791; R v McKay (1957) VR 560 (Australia).
108. E.g. Tulley v Reed (1823) 1 Car. & P. 7.
109. Kenny's *Outlines of Criminal Law*, 19th ed., Cambridge (1966) pp. 207-8.
110. See e.g. Glass v O'Grady (1866) 17 U.C.C.P. 233 (Canada); R v Montague (1949) 97 C.C.C. 29 (Canada); c.f. Davis v Lennon (1852) U.C.Q.B. 599, where it was stated that a person asked to leave another's house cannot question that other's reasons and motives for insisting on his departure. He can, however, question whether the assertion that the assault was committed on him for no other reason than to make him leave.
111. Wild's Case (1837) 2 Lew 214; Hall v Davis (1825) 2 Car. & P. 33; also, R v Meade & Belt (1823) 1 Lew.C.C. 184, per Holroyd, J. at 185: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger."
112. R v Hinchcliffe (1823) 1 Lew.C.C. 161. The prisoner was acquitted of a charge of manslaughter. She had been defending her barn against trespassers attempting to store corn there, was struck, and in reply threw a stone at the deceased. Per Holroyd, J.: "...it is not proved that the death was caused by the blow, and, if it had been, it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing." This appreciation of the distinction between the actual riposte and the consequences of that riposte is a critical aspect of private defence. The failure in some judicial spheres in France to recognise this has led to much confusion, as we saw in Chapter 3.
113. East, *Pleas of the Crown*, *supra*, p. 287; Stephen, *General View*, *supra*, p. 123; see, however, Williams, Textbook, 516.

At first sight, Stephens's rule (Digest, p. 254) might seem, illogically and unfairly, to require one to wait to be assaulted before using greater force against the trespasser; but of course, the normal rule as

to force being permitted where there is a reasonable apprehension of imminent danger is still applicable.

114. *"..the request to desist becomes an extremely important aspect of the defense - a means of settling questions without pointless violence."* Heberling (1975) 75 Columbia L.R. 914, 945. This issue highlights vividly the interests of all parties - the possessor, the trespasser and the State - in avoiding the needless use of force.
115. Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st ed., London (1982), 20-130; Weaver v Bush (1798) 8 T.R. 78; Green v Goddard (1702) 2 Salk. 641; Tullay v Reed (1823) 1 Car. & P. 6; Polkinhorn v Wright (1845) 8 Q.B. 197; Stephen, Digest, *supra*, p. 254. So far as Scotland is concerned, Hume does not treat the matter directly, although it is possible to infer approval of the rule from some passages (e.g. Commentaries, II p. 219). In any case, it seems unlikely that Scots law would be any different on this point.
116. Williams, *supra*, p. 516; c.f. R v O'Neill (1879) N.B.R. 49; MacDonald v Hees (1974) 46 D.L.R. 3d 720; R v Bushman (1968) C.R.M.S. 13, per Tysoe, J.A. at 20; Robson & Anr. v Hallett (1967) 2 Q.B. 939, per Lord Parker, C.J. at 952-3: "It seems to me that when a licence is revoked as a result of which something has to be done by the licensee, a reasonable time must be implied in which he can do so, in this case to get off the premises..." The rules may apply to a person initially lawfully present on the premises, but who is subsequently asked to leave; from this moment onwards he becomes a trespasser. For another interesting case involving revocation of (implied) licence, see Davis v Lisle (1936) 2 K.B. 434; this too involved police officers. The general question of defensive force against officers of the law (including the defence of property) will be dealt with separately - see *infra*, chapter 5.
117. Thus in Wild's Case (1837) 2 Lew. 214, it would have made no difference had the accused previously asked the deceased to leave. C.f. R v Kinman (1911) 17 W.L.R. 439. The defendant assaulted one K. in an effort to protect the property of another, entrusted to his care. The presiding judge found that there was no call for him to make a finding as to the question of any warning since he found the assault to be wholly excessive in the circumstances, and therefore it could not be justified whether or not a warning had been given.
118. See e.g. Model Penal Code s. 3.06.(3)(a)(ii); Perkins & Boyce, *supra*, p. 1156. They give the example of a blind person about to tread upon valuable flowers. But what of uselessness? It is submitted that one would be wise not to take immediate action against a trespasser on the basis that one knew he would, by his innate obstinacy, ignore any request anyway.
119. E.g. Weaver v Bush. 8 T.R. 78; Tullay v Reed (1823) 1 Car. & P. 5; Green v Goddard (1702) 2 Salk. 641; Polkinhorn v Wright (1845) 8 Q.B. 197; Williams, *supra*, p. 516. As a sidepoint one may question the basis of Professor Williams's rebuttal of Lanham, when he suggests that the latter indicated that the making of a request was an inflexible rule of law. But at no point does Lanham say this, expressly confining his remarks in these terms to "mere trespassers." When Williams says "if the trespasser is evidently determined to use force to enter, moderate

force may be used to expel him without any words being uttered.", he is of course referring to forcible trespassers, a group with which Lanham specifically deals (p. 371) when he says, under the heading "Trespassers entering forcibly", "...No warning need be given in such a case ."

120. Perkins & Boyce, *supra*, p. 1150

121. East, *Pleas of the Crown*, *supra*, p. 272: "There must be a felony intended; for if one come to beat another, or to take his goods, merely as a trespasser, though the owner may justify the beating of him so far as to make him desist; yet if he kill him, it is manslaughter" and at p. 287: "If A in defence of his house kill B, a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life."; Hawkins, *supra*, p. 72: "...and he who in his own Defence kills another that assaults him in his House in the Day-time, and plainly appears to intend to beat him only, is guilty of Homicide *se defendendo*, for which he forfeits his Goods, but is pardoned of course..." Note that Hawkins limits this to attacks committed during the day, for evidently the presumption of great danger were the attack to be perpetrated, would often be overwhelming.

122. The doubt arises partly out of Hawkins's express use of the term *se defendendo*, which, while indicating that the accused were pardoned, did differentiate it from a fully justifiable homicide. East is more clear on this point, but with the abolition of the distinction between these two types of homicide one cannot be certain how the matter would be disposed of today.

The decision in Cook's case (1639) Cro. Car. 537, advanced by Lanham in support of his argument that the use of deadly weapons is never justifiable against a forcible intruder in the absence of personal danger, is by no means conclusive. Cook shot and killed a sheriff's officer who unlawfully tried to gain entry by force to his house in order to execute a civil process. He was found guilty of manslaughter. Two things are of interest here. Firstly, the case involved violence against officers of the Crown - a situation which would always incite the judges to examine with great particularity the circumstances of the riposte. But secondly - and this is where arguably Lanham, *inter alia*, misses the key - it was adjudged manslaughter "for he might have resisted him without killing him..." If anything, this case is authority not against the use of deadly weapons as such against forcible trespassers, but in support of the existence in English law of a plea of excessive defence; see *infra* chapter 6; also R v McKay (1957) V.R. 560, per Lowe, J. at 563; *contra* Palmer v Reginald (1971) 55 C.A.R. 223, (1971) 1 All E.R. 1077. Note, furthermore, that here the risk of personal danger as such was low, but Lanham does appear to cover cases involving violence, suggesting (p. 371) that the normal rules of self-defence would apply. See, however, R v Sullivan (1841) Car. & M. 209.

123. People v Bateman 91 N.E. 387, 390 (1950) quoted Perkins & Boyce, *supra*, p. 1151. Of course the phrase is approved subject to the qualification that there is a risk of some violence to the occupier, though not necessarily grievous bodily harm. A liberal interpretation of the dictum would imply a free-running rule of autonomy, with the

requirement of proportionality abandoned as far as the dwelling is concerned.

Imagine, though, that X is upstairs under the shower, unaware of the fact that his sister is downstairs vainly resisting the attempts by Y and Z to enter in order to 'rough him up'. In this case, it is submitted, where only the use of deadly force will prevent the invasion of the intruders, it should be privileged.

124. The irony is that the dwelling, considered to be a place of refuge, could in fact heighten the danger to the victim of an attack. While in the street the defender would have the possible benefit of witnesses, succour and an avenue of retreat, these would be less likely available within the closed confines of his house, and the risk of an inordinate escalation in the gravity of an attack cannot be dismissed as purely hypothetical.

There is, in the writer's opinion, no good reason for according property owners the same privilege as applies in the dwelling, when it is merely their land which they are defending.

125. Reproduced among preface pages, *supra*.

126. E.g. Le Sellyer, *supra*, p291.

127. See the report by Monseignat, cited Locré, *Législation Civile, Commerciale et Criminelle de la France*, Vol. 30 (1832) p513.

128. Garraud, R.. (1888 ed.) Vol. 1, p. 408: "Pourquoi d'ailleurs le législateur aurait-il pris soin de préciser si nettement, dans les espèces qu'il prévoit, les conditions de la légitime défense alors que, pour les autres cas, la détermination de ces condition est abandonnée à la sagesse des magistrats ?"

129. Reproduced among preface pages, *supra*.

130. Chauveau et Hélie, p. 178; cf. *R v Meade & Belt* (1823) 1 Lew.C.C. 184.

131. There would be no need to examine whether the conditions of necessity and proportion were satisfied.

132. Cass. 11 juillet, 1844; S. 1844.I.777.

133. Cass. 8 décembre, 1871; S.1872.I.346.

134. But of even greater interest are the precise assumptions which underlie the *Chambre d'accusation* decisions. "Attendu ... que Braquet avait l'opinion que Lacore ne voulait pas pénétrer dans sa maison pour voler..." and later, "...car il aurait été bien plus important pour lui d'empêcher la consommation d'un adultère que le vol de quelques objets immobiliers." And in *Casabonne*: "Qu'il importe peu que Casabonne dût avoir la conviction que Gassibert ne cherchait pas à s'introduire dans la maison pour voler..." These statements, presumably approved by the *Cour de cassation*, indicate with uncommon forthrightness the accepted notion that what might be at issue was danger not only to the person but also to property. Given the inevitable interpretation which follows from these decisions, it seems strange that Tournier (note to Dijon, 21 mars, 1900; D.1901.II.473, 473) should cite both these cases as supporting the rebuttable presumption theory.
135. *Le Droit*, 15-19 décembre, 1857. The writer is indebted to Monsieur le Président Xavier Versini, *Président de la Cour d'assises de Paris*, for providing an account of the case.
136. *Cour d'assises de la Moselle*, 27 février, 1858 (Pochon); *Le Droit*, 3 mars, 1858.
137. It is this inherent ambiguity and ambivalence towards an irrebuttable presumption which permits two commentators to cite the very same cases in order to support their two entirely opposing interpretations of the state of French law. See Lyon-Caen, note sous Cass. Req., 25 mars, 1902; S.1903.I.5 at 7 and Tournier, note sous Dijon, 21 mars, 1900; D.1901.II.473, 473.
138. Tribunal Civil de Chaumont 8 août 1899 D.1901.II.473, note Tournier. A land-owner had been plagued by poachers on his estate, and had installed spring-guns loaded with salt in his grounds. However, this failed to deter the thieves, who even sent him letters of bravado mocking his efforts. He then replaced the salt with shot, and one night one of the thieves was shot and injured, as a result of which he had a leg amputated. The case is also mentioned below, within the context of the use of mechanical or explosive devices for the defence of property or person.
139. The attack was effectuated by a breach of the outer perimeter; it took place at night, and the house was inhabited at the time. The lower court largely based its decision on the fact that what was involved was property (goldfish in a pond). C.p. Crim., 11 juillet, 1844 (Braquet), supra, and Crim., 8 décembre, 1871 (Casabonne), supra.
140. Dijon, 21 mars, 1900; D.1901.II.473. Unlike the lower court, the *Cour d'appel* expressly referred to Article 329, and seems to have confirmed the irrebuttable nature of the presumption contained therein: "Attendu, en effet, que l'article 329 du code pénal admet, comme présomption légale, que l'escalade, pendant la nuit, des clôtures d'une maison habitée ou de ses dépendances crée un danger actuel et imminent, et permet à celui qui a fait des blessures pour le repousser, de se prévaloir du bénéfice de légitime défense." The reader will note then that the irrebuttable aspect applied equally to the existence of the threat; c.p. infra.

141. Cass. Req., 25 mars, 1902; S.1903.I.1, note Lyon-Caen.
142. There is much room for placing the decision on a quite different basis - the mere exercise of the right of property, the ratio focussing on the automatic nature of the defensive riposte. See *infra*.
143. There were, however, certain circumstances surrounding the case which were, to say the least, unfavourable to the plaintiff. The defender was a member of the landed aristocracy; his property had been repeatedly stolen, the thefts furthermore the work of the same individuals, who included the plaintiff; the plaintiff had gone so far as to write mocking letters to de Fraville, after the previous attempts to deter him had failed; and finally, the defence was made by the means of mechanical devices. For the possible relevance of this last point, see *infra*; however, the *Cour d'appel de Dijon* expressly stated that had he been there in person, de Fraville would have been permitted to shoot; see D.1901.II.473, 476.
144. In Paris, 18 février, 1933 (S.1933.II.107) the accused shot and wounded his daughter's lover, who was making a propitious exit from the family home, on overhearing a discussion between father and daughter. The wounding occurred in the dark, in the accused's study. There was a conflict of evidence as to whether there was any exchange of words, but ultimately the accused was acquitted on the facts, there remaining doubt as to whether he actually knew who the figure was.

In Crim., 8 juillet, 1942 (B.C. 1942 no. 88) the accused was convicted for having seriously wounded a 12-year-old boy who had entered with the intention of committing theft. The case, however, is not decisive authority on the question, as it may be that the Court found that one of the basic elements of Article 329(1) was absent: after one warning shot had been fired, the intruder had sought refuge under a tree, close to the exit; c.f. Douai, 28 mars, 1899 (Rec. Douai.99.184). In a decision of the *Chambre d'accusation* of the *Cour d'appel de Paris*, an *arrêt de renvoi* on a charge of murder was pronounced on two industrialists, a father and son, who ambushed and hunted down their servant who was on intimate terms with the latter's sister. They lay in wait for him as he entered the girl's bedroom, and pursued him outside, where they dispatched him with their weapons, near the exit to the property. They had been abundantly aware of the attendant facts and circumstances, and were accordingly committed for trial; Paris, Ch. acc., 9 avril, 1946. See R.S.C. 1948, 147, note Gulphe.

145. Tribunal Correctionnel de Mayenne, 6 mars, 1957; D.1957.458, note Pageaud.
146. Remarkable on two fronts. For in the one judgement, the Court enunciated the two principles of law which were to form the basis of the *Cour de cassation's* judgements in the most significant decisions on private defence of the twentieth century, Cr 19 février 1959 (Reminiac); B.C. no. 121; D.1959.I.161, note M.R.M.P.; J.C.P. 1959.II.11112, note Bouzat, *infra*; and Cr 16 février 1967 (Cousinet); B.C. no. 70; J.C.P. 1967.II.15084, note Combaldieu, *supra*, chapter 3.
147. In reality the 'involuntary' qualification of the offence charged was what was most decisive in the case, the Court holding that the notion

of involuntariness was incompatible with that of self-defence, and so excluded *a priori* any consideration of the plea; c.f. Cr 16 février 1967 (Cousinet); B.C. no. 70; J.C.P. 1967.II.15084, note Combaldieu.

148. Cr 19 février 1959 B.C. no. 121; D.1959.I.161, note M.R.M.P.; J.C.P. 1959.II.11112, note Bouzat.

149. See also Cr 20 décembre 1983 JCP.1984.IV.77 (Bourlier). It goes without saying that one should be careful, then, not to assume rigidly that the irrebuttable nature of the presumption was indeed laid down as law, given especially the decisions of the *Chambres d'accusation* in the *Jeufosse* and *Pochon* affairs. As the writer has remarked, though, the overall trend does seem to weigh heavily in favour of the rigid rule, at least up until the early part of the twentieth century, but one should not exclude entirely the view that the arrêt *Reminiac* was more a clarification of the law than a reversal of precedent, a *revirement de jurisprudence*.

150. E.g. J.C.P. 1959.II.11112: "...ce but ne peut être vraiment rempli que si la présomption de l'article 329 est insusceptible de discussion. Il faut que ceux qui ont l'intention de pénétrer indûment la nuit, même pour des motifs anodins, dans une habitation close, sachent que l'habitant a le droit indiscutable de tirer sur eux, quelles que soient les circonstances. Ce doit être pour eux une sanction inexorable. Alors, mais alors seulement, le risque qui est immense peut les inciter à la sagesse." (emphasis added).

151. Thus, whatever the present writer's views of the opinions held by Doyen Bouzat, he cannot agree that the inhibitory effect of an irrebuttable presumption is purely illusory. Day to day life provides us with thousands of examples. Nor are they limited to purely legal norms. Some years ago an over-exuberant sports fan, celebrating his country's rugby victory over Scotland, fell sixty feet from his precarious position on a bridge parapet in Edinburgh (he landed on top of a train, miraculously unscathed). The fact that there will always be some individuals overcome by drink or a thirst for danger in no way diminishes the overall inhibitory effect upon the vast majority of the general public of potential hazards - in this case gravity.

152. *"Les crimes et délits mentionnés au précédent article, (referring to meurtre, coups et blessures) sont également excusables, s'ils ont été commis en repoussant pendant le jour l'escalade ou l'effraction des clôtures, murs ou entrée d'une maison ou d'un appartement habité ou de leurs dépendances.*

Si le fait est arrivé pendant la nuit, ce cas est réglé par l'article 329."

Obviously, were it a case of real danger, then the normal principles of private defence would apply, and it would therefore be totally inappropriate to speak of an excuse.

153. Foster, *Crown Law*, *supra*, p. 273.

154. Donnedieu de Vabres, *supra*, no. 403: "...sinon, l'article 329 constituerait, en faveur de celui qui tue sans intention de se défendre,

dans un pur esprit de vengeance ou d'avarice, un brevet légal d'impunité." Savey-Casard, P., R.S.C. 1960, 29, 35: "Ce permis d'assassinat n'a nullement été dans l'intention des rédacteurs du code.."

155. M.R.M.P., D.1959.I.161, 163: "On ne saurait admettre qu'une fiction de la loi assure l'impunité à des actes dont le caractère criminel est évident dès lors qu'ils ont été commis dans un autre intérêt que celui de se défendre...". Garçon, *supra*, Article 329, no. 5; Légal, R.S.C., 839, 841; Chammass, S., *La Légitime Défense*, (thesis), p. 161.

156. Cour royale de Limoges (Ch. d'accusation), 11 juillet, 1844; S.1844.I.777, 777. While it is evident that the irrebuttable presumption received the stamp of the highest court in the land, one cannot help but wonder what would have happened had Monsieur Casabonne knowingly plunged his knife not into the unfortunate Gassibert, but into, say, the local curate taking a short-cut across the grounds.

The present writer wishes to point out, however, in the clearest possible terms that it would be wholly erroneous to interpret advocates of Doyen Bouzat's view as actually approving of the abuses made of the law of self-defence by some individuals. Doyen Bouzat does not wish to institutionalise such practices, he does not condone pre-meditated ambushes and the like. His point is that in order to achieve real protection for citizens, this regrettable price must be paid. :*"A ceux qui nous objectent qu'en nous prononçant pour le caractère irréfragable de la présomption, nous assurons l'impunité à des coupables et portons atteinte à la justice absolue, nous dirons qu'ils ont raison et que, tout comme eux, nous ne prenons pas cette atteinte à la légère, mais nous leur ferons deux remarques:*

Premièrement: Lorsqu'une règle juridique générale a une fonction sociale d'une utilité indiscutable, il peut être bon de la maintenir si les atteintes qu'elle porte à la justice absolue ne sont ni trop nombreuses ni trop graves. Il en est est bien ainsi ici. D'une part les cas de personnes tuant ou blessant des individus qu'elles savent non dangereux sont tout de même très exceptionnels ! D'autre part, il s'agit de laisser un coupable impuni, ce qui est regrettable certes ! mais arrive souvent (puisque tant de coupables sont acquittés au bénéfice du doute ou même échappent aux poursuites) - et est beaucoup moins grave que de punir un innocent." J.C.P. 1959.II.11112. His argument is highly persuasive, but ultimately the position one takes often rests more on one's own innate convictions than on any logical argumentation.

Finally, it is clear by the decisions of Paris, 18 février, 1933, Crim., 8 juillet, 1942, T.C. Mayenne, 6 mars, 1957, and Crim., 19 février, 1959, above, that the judiciary were concerned not merely with the latter-day Messieurs Braquet and Casabonne, but also with those who react excessively in face of an apprehension judged unreasonable by ordinary standards.

157. This would, according to one argument, basically be the position if, as is suggested by some commentators, the burden of proof lies in any case with the prosecution.

158. Merle & Vitu, *supra*, no. 417. Such an observation is particularly pertinent in a jurisdiction such as France which is based on the inquisitorial system, compared with the adversarial tradition.
159. *Supra*, Article 329, no. 6.. He cites several writers in support but it is Garçon who points out most clearly the weight of the burden which would lie with the prosecution in such a case. Seen in this light, the rebuttable presumption theory is an answer to those who argue that Article 329(1) is rendered virtually impotent.
160. Paris 18 février 1933 S.1933.2.107, *supra*: "...il est non moins certain qu'il y aura lieu de s'inspirer de ses dispositions chaque fois que le meurtrier ou l'auteur des violences aura pu ignorer les intentions de celui qui violait son domicile et concevoir la moindre crainte touchant sa sécurité personnelle." (emphasis added). Note the remarkable similarity with the text in Garçon; Dijon, Ch. Correctionnelle, 27 juin, 1972; J.C.P..1972.IV.261: a person who surprised and shot a vegetable thief by night is presumed to have acted in private defence - and it is for the wounded victim to prove that his conduct was not threatening. Indeed this very significant latter case is preferable to the Paris decision, for the facts here were less favourable to the accused. The Paris decision is still tainted with a curious and seemingly contradictory reference to "un danger grave". It is this latter notion which was retained solely by the *Cour de cassation* in Reminiac; c.f. *supra*.
161. *Supra*, Article 328, no. 57.
162. *Réflexions sur l'article l'article 329 du Code pénal*, 1960 RSC 29.
163. *Id.* at 38-9.
164. *Id.* at 39-40.
165. *Id.* at 39: "...les juges devront, en vertu de l'article 329, l'absoudre d'un mouvement précipité et malheureux dont les conséquences ont largement dépassé l'importance de la faute commise par l'auteur de l'escalade" ; and at 40: "A celui qui peut se croire en péril, l'article 329 est utile, non pas tellement parce qu'il présume réalisées les conditions de la légitime défense, mais parce qu'il admet que l'homicide même est proportionné à la faute de l'agresseur, écartant ici l'idée d'un excès dans la légitime défense." (original emphasis).
166. As already pointed out, Article 322 allows a qualified excuse where the violence is committed against someone entering in the same manner by day, even where the killing was disproportionate to the harm threatened. It would be inconsistent then were the same person who reacted in exactly similar fashion by night in a worse position in the eyes of the criminal law.
167. Grenoble, 6 avril, 1848; D.1849.II.119 - an *arrêt de non-lieu* delivered in the case of a park-guard who had fired at an intruder who, unlike his companion, had not fled, and further made a step towards the guard, holding a sword-stick; Besançon, Ch. civ., 22 février, 1875; D.76.II.116 - an *ordonnance de non-lieu* confirmed in the case of a man, victim of previous thefts, who shot and wounded an adolescent found on the roof

of his house, but who was in fact placing a May tree there, according to local custom.

168. E.g. Merle & Vitu, *supra*, no. 417; Pradel, J. *Droit Pénal Général*, 4ème éd., Paris (1984), p. 326; Pradel, J. & Varinard, A., *Les Grands Arrêts du Droit Criminel*, Vol. 1 (Paris, 1984), p. 209 et seq..
169. Garçon, *supra*, article 329, no. 5 - "*la moindre crainte...*"; Savey-Casard, R.S.C. 1960, 29 at 40: "*...écartant ici l'idée d'un excès dans la légitime défense.*" Whichever view one takes, they are both preferable to the opinions apparently expressed by Chauveau et Hélie, *supra*, no. 1493 et seq., and Le Sellyer, *supra*, no. 185, who seem to demand full necessity and proportion even with the night-time rule, thus truly reducing Article 329(1) to a virtually redundant state.
170. Grenoble, 6 avril, 1848; D.1849.II.119 and Besançon, Ch. civ., 22 février, 1875; D. 1876.II.116; c.p. Garçon, *supra*, Article 329, nos. 15 & 16, and Savey-Casard, R.S.C. 1960, 29 at 39, fn. 1 - he adds a third case, Chambéry, 6 février, 1907; D.1907.V.19.
171. It is interesting to note that Garçon uses the expression "*qu'il n'était pas en état de légitime défense*" rather than "*qu'il n'a pas agi en état de légitime défense.*" While the writer does not claim to present this as irrefutable proof of his theory, the choice of words does seem to be not without significance. One wonders, too, how many advocates of the view forwarded by Professor Savey-Casard realise the apparent proximity, if not more, to the interpretation offered by Garçon, *supra*, no. 6.
172. Cr 8 janvier, 1974 L.72-92.471 (Vidal).
173. Dijon, 8 janvier, 1965, R.S.C. 1965, 421, note Hugueney.
174. R.S.C. 1965, 414, note Légal; Gaz. Pal., 27 février, 1965. The burglar was apparently not content with one attempt at gaining forcible possession of the weapon, but, ignoring a shot fired between his legs, attempted the same again. When he tried to flee, five shots were fired, 'from the hip', in rapid series, and he was wounded by one. On the rather subjective interpretation given to the entire proceedings, from the point of view of the accused's behaviour, see Savey-Casard, *supra*, p. 39; Pradel et Varinard, *supra*, p. 214; c.f. *R v Taylor* (1970) W.V.R. 636 (Canada).
175. L.74-91.856.
176. See also Cr 18 juillet 1984 L.83-94.079 (Lieballe). In that case L, A and B were asked by M, to make less noise, in response to which they shouted abuse, then began to tear down the railings of his house. He replied by firing one shot in the air. Undeterred by this they entered the garden and advanced upon the house, one of them armed with a long iron bar. A attempted to climb up outside to the first floor, to reach M. M at that moment fired two shots at L and B, who were in the garden facing him, killing L. The *Chambre d'accusation de la Cour d'appel d'Aix-en-Provence* confirmed the investigating magistrate's *ordonnance de non-lieu*, closing the case, and the *Cour de cassation* rejected a *pourvoi* against this decision. Counsel in that case had in

fact suggested that M could have escaped the danger by barricading himself and his family in his house - a submission which, not surprisingly, failed to impress the Court.

177. "Attendu qu'il résulte de ces constatations souveraines qui établissent que Hecht se trouvait dans le cas de nécessité actuelle de défense de soi-même et d'autrui prévu par l'article 329-1^{er} du Code pénal alors que Kaliszuk n'a pu rapporter la preuve contraire ..." c.f. Grenoble 6 avril 1848 (M.P. c V.): "... attendu que dans le cas prévu par l'art.329,51, précité, il n'est pas nécessaire que l'auteur de l'homicide ou des blessures prouve, pour se justifier complètement, qu'il y a eu pour lui nécessité actuelle de tuer ou de frapper, et que sans cela sa défense personnelle n'aurait pas été assurée, parce qu'alors on retomberait sous l'empire du principe général posé dans l'art.628 (sic.) c. pén, et les assimilations contenues dans l'article 329 seraient superflues..." (emphases added).

178. L.76-91.194.

179. E.g. Cass., 20 décembre, 1977; B.C. no. 350 (Bourlier) and see Cr 22 mars 1983 L.83-90.217 (Bourlier); Cass., 5 juin, 1984 B.C. no.209 (Muller); c.f. Colmar, 24 janvier, 1980; Gaz. Pal. 1980, 579 - the rejection of the accused's defence in this regrettable case was related to the 'involuntary' qualification of the charge preferred. For criticism of the approach to the issue of private defence and 'involuntariness', see *supra* chapter 3. And compare Cr 10 juin 1970 L.70-90.241 (Bouche) with Cr 8 janvier 1974 L.72-92.471 (Vidal).

180. Toulouse, 10 octobre, 1972; J.C.P. 1973.IV.291 - backroom of a jeweller's shop in which the owner had, for two months previously, slept, was held within Article 329(1); Cr. 18 octobre, 1980; Gaz. Pal. 1981.I.308, cf. R.S.C. 1981, 615, note Levasseur - a sheep-pen, situated within its own enclosure, 150 metres from the main buildings and further separated from them by a road was not within the definition. This has been criticised by the annotator to the Gazette du Palais report, but the present writer rejects any *in favorem* application of pleas of justification where they violate the basic principles of private defence and any legislative enactments intended to entrench this right. The protected area will extend to the house and any "dépendances" within the general limits of the property (Crim. 18 octobre, 1980). Also, compare again Cr 10 juin 1970 L.70-90.241 (Bouche) with Cr 8 janvier 1974 L.72-92.471 (Vidal).

181. Amiens, 16 mars, 1843 (Prophète); S.43.II.240; Cr. 11 juillet, 1844; S.44.I.777 (Braquet); Req. 25 mars, 1902; D.1902.I.356; Paris, 18 février, 1933; S.1933.II.107; Le Sellyer, *supra*, p. 290, citing Carnot (contra); Garçon, *supra*, Article 329, no. 21; c.p. Garraud, *supra* 1888 edition, vol. 1, p. 409. Equally the writer respectfully approves Garçon's assertion that the presumption would apply where the intruder had entered by day, only to emerge and be confronted at night: "Il (the owner) n'a pas à rechercher à quel moment et par quels moyens le malfaiteur a pénétré dans son habitation." For the definition of night, see T.C. Warbonne, 13 février, 1926; S.1926.II.7.

182. Compare: Amiens, 16 mars, 1843, *supra* - burglar shot and wounded while escaping through a skylight; Dijon, 89 janvier, 1965; Gaz. Pal.

1965.I.155, *supra*; (c.f. Montpellier, 19 novembre, 1979 D.1981.IR.153 note Puech with Crim., 20 décembre, 1977, B.C. no. 350; obviously though, where one shot has set the intruder clearly running for his life, it would certainly be criminal to gun him down; see Douai, 28 mars, 1899; *Somm.* 99. 5313, *Rec. Douai*, 28 mars, 1899, cited Garçon, *supra*, Article 329, no. 12, and approved Payen, *De l'Emploi des Engins Automatiques pour la Défense des Propriétés* (thesis), Paris (1905). Note, in T.C. Mayenne, 6 mars, 1957; D.1957.458 (and Reminiac), the victims had retreated or were in the process of doing so, but the point is that, especially in the former case, the personal threat could only be described as illusory.

183. Garraud for example (1888 edition, *supra*, no. 248) argued that it would be preferable merely to treat night attackers as coming under Article 328; he is echoed by Chammas, *La Légitime Défense*, thesis, p. 171.
184. *Supra*, note 166.
185. E.g. Pradel, R.S.C. 1959, 839 at 841. Chammas, *supra*, p. 157. C.f. Best, J. in *Ilott v Wilkes* 3 B. & Ald. 304, at 318.
186. We are often reminded by criminologists that the most effective dissuasion from crime (= injury/harm to victims) is not the severity of sanctions as such, but their *likelihood*. This depends upon an effective police force and in situations of self-defence it is precisely this which is lacking. There is an inherent circularity in the reasoning of such writers. See also, the fallacious argument forwarded by Tournier, D.1901.II.473, 474 column 1 at c.
187. Coke, *supra*, p. 220; Hawkins, *supra*, p. 71; East, *supra*, pp. 271 & 287; Stephen, *Commentaries*, *supra*, p. 99; Kenny's *Outlines of Criminal Law*, 19th ed., Cambridge (1966), p. 207; Lanham, (1966) *Crim.L.R.* 368, 373; Hume, *Commentaries*, I, pp. 218-9; Alison, *supra*, p. 136. C.f. Stat. 24 Hen. 8 c.5.
188. Cf. Burnett, *supra*, pp. 53-4.
189. The writer is not so much thinking of cases where the robber, imagining he has picked an easy prize, falls upon someone with little money on him. There, the danger of further violence from the frustrated aggressor is well recognised. Rather, imagine the (admittedly unlikely) case where A threatens me with deadly violence unless I surrender to him my cloth cap to which he has taken a particular fancy. Here it is submitted that, subject to the imminence requirement, I could where necessary kill him to prevent him from executing his threat.

Prima facie, a surrender rule could be analogous to the rule in certain jurisdictions which demands that one retreat rather than kill, where this can be done safely. However, the difference is that in the latter, the aggressor is frustrated in his designs, while in the former acquiescence permits him by brute strength to achieve his aims.

190. Lanham, D. (1966) *Crim.L.R.* 368, 373.
191. The Times, September 16th, 1967.

192. C.f. Perkins & Boyce, *supra*, p. 1154.
193. Regarding the right of recaption, see *R v Milton* (1827) Mood & M. 107; *Blades v Higgs* (1865) 11 H.L.C. 621, criticised Williams, Textbook, *supra*, p. 521. But for limits to the right, see the Canadian case of *R v Duce* (1960) 33 C.R. 174.
194. Institutes, III, p. 56: "As if a thiefe offer to rob or murder B either abroad or in his house, and thereupon assault him, and B defend himself without any giving back, and in his defence killeth the thief this is no felony; for a man shall never give way to a thief, & neither shall he forfeit anything."
195. (1984) 1 All E.R. 988.
196. *Id.* at 999.
197. "whatever that meant" comments pointedly Professor Williams (Textbook, p. 495).
198. In the circumstances, then, it is possibly the case that the decision is closer to that of *R v Meade & Bell* (1823) 1 Lew.C.C. 184, *supra*. If so, then it must be pointed out that its interest, while different, is no less significant to students of the law of private defence.
199. Significantly, the Court of Appeal in Attorney General's Reference (No. 2 of 1983) made no mention of section 3, and expressed their opinions solely in terms of private defence.
200. Criminal Law of Scotland, 2nd ed., Edinburgh (1978), p. 753.
201. Commentaries, I, p. 222: "Put the case, that a person on foot, and at a place remote from any house or resort of passage, meets a thief riding off in all haste upon his horse, which he has stolen from the field. If he call him to stop, and if instead of complying the thief increase his speed, so that he will soon be out of the reach of the owner, or any hue and cry he can raise, there seems to be no sound law which should hinder him from saving his property in this necessity, though at the expense of the felon's life." c.f. Alison, *supra*, pp. 22 & 23.
202. Commentaries, I, p. 220.
203. Criminal Law of Scotland, *supra*, pp. 53-4.
204. *Id.* at p. 55.
205. *Id.* at p. 57. On this last point he cites no caselaw, but quotes from Reg. Majestatem Lib.IV.Cap.23: "Si autem latro expectare noluerit, sed fugam acceperit, licitum est de jure concessum, talem latronem fugientum interficere." The rule however seems more to be applicable to the case of arrest.

It is possible to explain Hume's and Burnett's reticence, or equivocation as regards theft in relation to necessity. Often they would reject killing a thief, because it would not be necessary to do so - one could, for example, call out rather than mount an ambush. In

such an event the intruder would in all likelihood make off, and the goods would be saved. If he did not run off, there could be risk of personal danger to oneself, thus bringing in the normal rules of self-defence - in this case property would no longer be at issue. But take Hume's example of the sneak thief running off with one's horse (*supra*). One may call out to one's heart's content. The thief is quite happy, and he most certainly won't stop. There, necessity would demand that one use potentially lethal force. But, leaving aside any doubts as to the question of proportion on the facts as given by Hume in modern times, obviously Hume accepted such killing to be proportionate in his day. If so, then in addition to what is in reality recaption, a *fortiori* Hume should allow the killing of a person who would destroy his horse tethered some distance from himself.

206. *Supra*, pp. 143-4.

207. (1830) Bell's Notes, 77.

208. Hume, Commentaries, I, p. 220, fn. 2.

209. Note that Burnett (*supra*, pp. 54-55) questions the case, as doubtful on the grounds that the action may not have been necessary. It is also clear that Hume (Commentaries, I, p. 221) expresses doubts as to the juridical propriety of the decision, and Professor Gordon (*supra*, p. 753), in his discussion on the *defence of property* remarks that "*Hume considered that the case went further than his view of the law.*" With respect, however, the writer would wish to point out the inference which could be possibly - and erroneously - drawn from this comment; for a reading of the relevant passage indicates that Hume's misgivings are more derived from doubts as to a breach of the necessity requirement, and a suspicion (shared by Burnett) that the accused may have been motivated by feelings of revenge, and wished more to punish the thief than protect himself or his property. Finally, it would appear that the acquittal of Williamson was probably based simply on the Scots Act of 1661, c.217. If so, the reference to the possibility or otherwise of preserving the property offers a possible added Scottish dimension to the reasons for the *fur nocturnus* rule, also Hume, I, p. 222: "*Put the case that a person on foot...meets a thief riding off...*".

210. (1826) Syme, p. 188, p. 210 respectively.

211. There are several difficulties with this case. It cannot have helped the accused that the death inflicted was effectuated by the means of a mechanical device (a 'spring-gun'). Nor that the killing was done in preservation merely of game. And it is precisely this aspect which makes the decision less than final on the point of deadly property defence, for virtually all of the judgements are framed within the context of the protection of game. Lord Gillies's reference (p. 211) to the possibility of game being preserved by non-deadly means both begs the question of necessity and of what his stance would be were particularly valuable property concerned (proportion). In his concluding words (p. 212) he says: "*In no period in Scotland has it (i.e. game) been preserved at such a price as is paid for it in the sister kingdom.*" (One might ask why he did not take the opportunity to refer to the defence of property *tout court*). Likewise, Lord Pitmilley, at p. 214, referring to game and trespass, and Lord Alloway who rested part of his reasoning on the hypothetical example of deadly force use to protect turnips and beans, adding (pp.216-17) that "*no two things can be more different than the game-laws of England and Scotland.*" The Lord Justice-Clerk mentions mere trespass, shrubberies and preserves, while appearing to limit further his discussion to *intrusions* on real property. The fact that there was manifest disproportion here cannot be taken as laying down a general principle for all other cases. Nevertheless, Lord Alloway does give his opinion on the general state of the law. But (a) he is the only one to do so, and (b) in its restriction to the defence of life or property in a house where it would be felony to take it, it is arguably incorrect, being too restrictive. This particular case cannot assuredly be taken as authority for a rebuttal of the opinion favoured by Hume where say a valuable item (a horse) were involved.
212. (1843) 1 Broun 558.
213. Criminal Law of Scotland, *supra*, pp. 762-3.
214. (1959) J.C. 39.
215. (1959) SLT 215, 217-8.
216. There are of course cases where the defender would be killing to save property, but at the same time to protect a person from harm which threatened a person's life. If while I am out on the moors, X runs off with my back-pack containing life-saving medicines, it is submitted that no jurisdiction would merely excuse his death, committed to save my stricken son. Such a killing would be justified.
217. This must be so, for the following reason. If it were merely excused, then the act remains unlawful. The negation of guilt is particular to the accused in question, and rests on the absence of *mens rea*. This would be for example the case of X, an insane attacker, or Y, who fires at another in the reasonable but totally erroneous belief that the latter was about to kill him. Both X and Y would be entitled to an acquittal - however, both would not be justified in their actions but merely excused, for their lack of criminal responsibility in no way diminishes one's right to kill, where necessary, in order to save oneself. We can see how relevant this question of proportionality becomes to the issue of property defence. For if one decides that it

would be totally disproportionate to kill in order to save one's television set from being carried off, the consequence is that on seeing you raise your shotgun against the thief who is making off with it, your next-door-neighbour could be justified in killing you to prevent the slaying.

218. A pocket-book might well contain the entire life savings of an individual, while his dwelling may be no more than the flimsiest of constructions, and of little value.
219. The loss of £20 000 may be less damaging to our millionaire than to the man in the street, but to society it is surely irrelevant who the particular victim is. A theft of £20 000 is a theft of £20 000, etc. While the overall circumstances of the theft, including the circumstances of the victim and, say, any breach of personal trust (cf. T.C. Toulouse, 8 octobre, 1969; D.1970.315, note Cédicé) would be reflected in sentencing, one might point out once more that the issue of punishment is not as such relevant to the question of private defence. The main issue is prevention, which should apply with equal force in both situations posited.
220. Regrettably, the writer would see this reasonable view as being that of the law and not that of the general public - the issue of property defence, as witnessed in France, is possibly the area of the law on private defence most vulnerable to abuse.
221. Consider also the following unlikely, but plausible, situation. After much persuasion X, an elderly crofter, wisely decides to deposit his entire life savings in the mobile bank, and awaiting its arrival takes a nap in the sun in his front garden. However, Y, profiting from his inattention, takes his jacket and runs off. X thereupon awakes, realises what has happened, and after calling out in vain, grabs his shotgun and aims at the thief. From the other direction, his neighbour Z, a righteous individual with a commendable respect for human life, grabs his own gun and after warning X to desist, shoots him dead from a distance. The result: one thief has escaped; one pocket-book containing a small fortune is stolen; one theft victim is dead; and one third party now has blood on his hands. While the writer unreservedly accepts that such is the price to be paid for society's affirmation of community values relating to the value of human life where property of little or moderate value is involved, he would at least question its appropriateness in the above circumstances.
222. Indeed, it is possibly this very attitude which explains the great caution observed by, *inter alia*, Lord Justice-General Clyde in McLuskey v H.M.A (1959) SLT 215. Might it not be reasonable to imagine that, were he to in some cases allow deadly property defence, such a principle could only proceed, as above, on a case by case basis ?
223. Faustin Hélie, *supra*, no. 721; Chauveau et Hélie, *supra*, pp. 177-8; Ortolan, J., *Eléments de droit pénal*, 5ème éd., Paris (1886), no. 441; Priolaud, (thesis), Angoulême (1903); Payen, (thesis), Paris (1905). The reader is reminded that neither Article 328 nor Article 329 makes any reference to property. Might one be forgiven for thinking that the trauma of the French revolution, the break it constituted with the *ancien régime* in legal, as well as in other spheres, and the consequent

pride in the new Code pénal led many commentators to take a cautious and strict approach to legislative interpretation, conscious of the possible abuses of any other stance ? In fairness, some others, such as Payen and Lyon-Caen, favoured property-defence in principle, but rejected it for textual reasons, arguing simply that the law did not permit it, and much as they might wish it, until the law declared it licit, rules of judicial interpretation demanded that it remain illegal.

224. E.g. Merle et Vitu, *supra*, no. 410; Pradel, J., *Droit Pénal Général*, 4ème éd., Paris (1984), p. 322.
225. Garçon, *supra*, Article 328, no. 54; Stéfani, Levasseur et Bouloc, *supra*, no. 339; Pradel, *La Défense Automatique des Biens*, in: *Mélanges en l'honneur du Doyen Pierre Bouzat*, Paris (1980), p. 217 at 224-5; Chammas, (thesis) p. 266; contra, Lyon-Caen, S.1903.I.5.
226. Rejected by, *inter alia*, Garçon, *supra*, Article 328, no. 54 - "quelle réparation attendre d'un mendiant qui met le feu à une meule de blé ?"; Pradel, *Droit Pénal*, Paris (1984), p. 322; Merle et Vitu, *supra*, no. 410.
227. Eg Garçon, *supra*, Article 328, nos. 53-57; Donnedieu de Vabres, *supra*, no. 392.
228. Pradel, *La Défense Automatique des Biens*, in: *Mélanges en l'honneur du Doyen Pierre Bouzat*, Paris (1980), p. 217 at 227; Garraud, 1946 R.S.C. 433; Legeais *Légitime défense et protection de biens - aperçus de droit comparé*, 1980 R.S.C. 325, 331; Couvrat, P., *La Notion de la Légitime Défense dans le Nouveau Droit Pénal*, Montpellier, novembre 1983, Rapport - XIème Congrès de l'Association Française de Droit Pénal, pp. 7, 9; Chammas, thèse, *supra*, p. 267.
229. E.g. Priolaud, (thesis), Paris (1903), pp. 52-3; Lablancherie, (thesis) (1909), pp. 37-9; c.f. Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, p. 347.
230. E.g. Payen, thesis, *supra*, p. 83.
231. Such a view comes distinctly across on a reading of, for example, Payen, *supra*, pp. 38-42. His partial and hopeful reliance upon discretion at the investigative stage lies particularly open to criticism: "...nous sortons alors du domaine du droit pour entrer dans celui du fait et de la pratique."
232. With the consequences arising from the desirability of preventing the accused's actions, which would necessarily follow, *supra*.
233. To borrow a phrase from Payen, (thesis), *supra*, pp. 30-31, "...on ne peut accepter une hypothèse rare comme fondement d'une théorie générale qui aurait pour but et pour résultat de déclarer irresponsables précisément ceux qui ont le mieux fait preuve de présence d'esprit."
234. E.g. Lablancherie, p. 39; Fuzier-Hermann, *Répertoire Général Alphabétique du Droit Français*, Vol. 26 *Légitime Défense*, no. 25.
235. Cf. Garçon, *supra*, Article 328, no. 51.

236. E.g. Cattan, (thesis), Bordeaux (1972), p. 119; Chammas, (thesis) pp. 266-7.
237. See Le Sellyer, *supra*, no. 148; although he remains equivocal on the matter and does suggest a general justification for killing where the harm was very substantial; also Merle et Vitu, *supra*, no. 410; c.f. Savey-Casard, *supra*, at p. 32.
238. *Supra*, no. 339. In support of this, see Montpellier, 19 novembre, 1979; D.1981.IR.153. The latest revision of the *Code pénal* would, if enacted, remove any doubt on the matter. Article 36 states: "*N'est pas punissable celui qui accomplit un acte imposé par la nécessité actuelle de la défense d'un bien à condition que cette défense soit légitime et proportionnée à la nature et à la gravité de l'atteinte.*" One may presumably take it that the inclusion of a separate article was in order to stress the more rigorous proportionality test which would apply.
239. Article 329(2), "*...Si le fait a eu lieu en se défendant contre les auteurs de vols ou de pillages exécutés avec violence.*"
240. E.g. Bouzat et Pinatel, *supra*, Vol. 1 p. 364; Savey-Casard, in his famous article in R.S.C. 1960, 29, makes little direct reference to Article 329(2). Professors Stéfani, Levasseur et Bouloc make none.
241. See though Montpellier 12 février 1947 D.1947.S.22 (Julien c Méric); Cr 28 mai 1974 L.73-91.309 (Belca); and Cr 5 juin 1984 B.C. no. 209 (Muller), although it is difficult to understand the reference to A329(2), since the last case was a classic example of A329(1) private defence.
242. *Traité de Droit Pénal et de Criminologie*, Vol. 1: *Droit Pénal Général*, par Pierre Bouzat, 2ème éd., Paris, (Dalloz, 1970) p. 364.
243. See e.g. *Le Figaro* 26 novembre 1986, p10.
244. The 1983 proposed revision of the *Code pénal* does not make the situations covered by Article 329(2) the subject of a separate provision.
245. Req., 25 mars, 1902; S.1902.I.5, note Lyon-Caen, *supra*; Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, no. 339.
246. S.1872.I.346.
247. See *infra*. In addition to these cases though, one may cite several decisions involving the destruction of dogs, where the principle of *la légitime défense* seems to have been applied, implicitly or expressly. See Cass. civ., 21 avril, 1840; S.1840.I.299; Crim., 7 juillet, 1871; B.C. 1871, no. 61; Crim., 17 décembre, 1864; this last one expressly put it in terms of "*légitime défense*"; cf. Tribunal de Simple Police d'Ouchy-le-Château, 20 juin, 1946, 2 août, 1946. For British cases, see Gott v Measures (1947) 2 All E.R. 609; Cresswell v Sirl (1947) 2 All E.R. 730; Goodway v Becher (1951) 2 All E.R. 349; Workman v Cowper (1961) 1 All E.R. 683; Farrell v Marshall (1962) S.L.T. 65.

248. Cr 8 juillet 1942 B.C. no.88
249. See R.S.C. 1946, 433.
250. Pradel, *La Défense Automatique des Biens*, in: *Mélanges en l'honneur du Doyen Pierre Bouzat*, Paris (1980), p. 217, at 225. The case he cites is Tribunal de Simple Police de Valence, 30 juin, 1955; D.1956.S.56; Crim., 19 février, 1956. See also Amiens, 8 novembre, 1951 (see Richard, A., *Gaz.Pal.* 1952.D.14) which, as the commentator points out, should have been treated as a case of private defence.
251. Thus, whatever the precise moment at which the notion became accepted, one may confidently say that the assertion by the Tribunal Correctionnel de Toulouse (8 octobre, 1969; D.1970.315) that private defence was limited to force used in prevention of attacks against the person is wrong.
252. D.1981.IR.153, obs. Puech.
253. See *supra*, chapter 1.
254. 28 janvier, 1920, cited, *inter alia*, Bouzat et Pinatel, *Droit Pénal Général*, *supra*, Vol. 1 p. 363.
255. T.C. Amiens (7 juillet, 1964); Amiens, 23 février, 1965 in Hugueney, L., R.S.C. 1965, 421.
256. 14 décembre, 1967, G.P.1968.I.134.
257. E.g. Stéfani, Levasseur et Bouloc, *Droit Pénal Général*, *supra*, no. 339.
258. Larguier, R.S.C. 1981, 853 at 858.
259. One major exception is Garçon, *supra*, Article 328 nos. 53 & 57, where he does appear to view such action as justified, in exceptional cases. See also generally, the writings of Doyen Bouzat. Professors Merle et Vitu, *supra*, no. 410 are particularly intriguing in their assertion that "...tous les auteurs sont d'accord pour admettre la légitime défense des biens, à condition bien entendu que les moyens employés respectent la vie de l'agresseur et ne dépassent pas la stricte nécessité du but poursuivi." If by this one may understand that life may never be taken, then, with respect, it is a position which the present writer cannot share.
260. Garçon, *supra*, Article 328, no. 53.
261. An alarm will not be of much use where it fails to operate - or even where it does. The property may well be isolated, or in fact their unreliability may induce a "cry wolf" response by some, neighbours or authorities. One Chief Constable in England warned recently that his force had to consider a blanket ban on responses to burglar alarms, such was the incidence of false-alarms (98%) among station-linked devices. See "P.M.", BBC Radio 4 U.K., 5th August 1985.
262. E.g. Lepointe, B., *Le Diagnostic Judiciaire des Faits Justificatifs*, 1969 R.S.C. 554, 565-6.

263. Attorney-General's Reference (No. 2 of 1983) (1984) 1 All E.R. 988; Ryans v Hughes (1978) 3 All E.R. 412; Grieve v MacLeod 1967 (J.C.) 32; Dijon, 21 mars, 1900, D.1901.II.473, 476; Légal, 1970 R.S.C. 373, 374-5; Pradel, *La Défense Automatique des Biens*, supra p. 217, at 227. For an effective rebuttal of Lepointe, see Cattán, (thesis), Bordeaux (1972), pp. 150-52.
264. E.g. T.C. Chaumont, 8 août, 1899; D.1901.II.473, note Tournier.
265. (1826) Syme 188 and 210, respectively.
266. As amended.
267. "Whosoever shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanour, and being convicted thereof shall be liable...to be kept in penal servitude...; and whosoever shall knowingly and wilfully permit any such spring gun, man trap or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some or other person to continue so set or placed, shall be deemed to have set and placed such gun, trap or engine with such intent as aforesaid..." The text is substantially that of the Spring Guns Act 1827, which it superseded. This latter Act was apparently passed in the wake of the furore which surrounded the decision in the civil case of Hott v Wilkes (1820) 3 B. & Ald. 304, which held against the plaintiff, a trespasser who, though aware that spring-guns were set, strayed in a wood and was injured by one of them. The case is by no means dissimilar to Req., 25 mars, 1902; S.1903.I.5, note Lyon-Caen.
268. "...Provided, that...nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling house, for the protection thereof."
269. C.f. Lanham (1966) Crim. L.R. 328, 377-8; Williams, *Textbook*, supra, p. 518.
270. Reported in *The Times* 9th October 1976.
271. Tribunal de Simple Police de Lagny, 3 février, 1954; D.1954.396; Amiens, 23 février, 1965; R.S.C. 1965, 421, obs. Hugueney; Tribunal correctionnel d'Aix-en-Provence, 21 avril, 1969, R.S.C. 1970, 97, obs. Levasseur, 373, obs. Légal; Tribunal correctionnel de Toulouse, 8 octobre, 1969; D.1970.315, note Cédicé; R.S.C. 1970, 649, note Levasseur; Cass, 18 janvier, 1977; Gaz.Pal., 5 avril, 1977, R.S.C. 1977, 334, obs. Levasseur; Cour d'assises de l'Aube, 20 novembre, 1982 (unreported); Cass., 15 octobre, 1980, Gaz.Pal. 1981.I.308; R.S.C. 1981, p. 615, obs. Levasseur; p. 853 note Larguier.

272. Amiens, 23 février, 1965; supra, note 251, affirming T.C. Amiens, 7 juillet, 1964.
273. Cour d'assises de l'Aube, 20 novembre, 1982 (unreported).
274. E.g. Cass. Req., 25 mars, 1902, supra.; Cass., 15 octobre, 1980, Gaz.Pal. 1981.I.308, R.S.C. 1981, p. 615, obs. Levasseur; p. 853, note Larguier.
275. E.g. Lanham, D., (1966) Crim. L.R. 368, 377-8.
276. English law's "most potent evidence" (Palmer v Reginam (1971) 1 All E.R. 1077, at 1088) would no doubt be all the more active; cf. for France "la moindre crainte" of the accused: Paris, 18 février, 1933; S.1933.II.107.
277. The present writer would point out that he does not share the view held in some quarters, which, through the adoption of an almost abstract analysis of the phenomenon, leads frequently to a highly restrictive view of the scope of the plea of private defence. Nevertheless, he cannot support an approach which looks no further than the appearance of legal principles rather than taking into account the realities of the situations in which they are supposed to apply.
278. This is in fact the initial assumption made by Lanham, supra, pp. 377-8. See, however, footnote 42 on page 378; Perkins & Boyce, supra, p. 1159; U.S. v Gilliam 25 Fed. Cas. 1319, No. 15205a; S v Moore 31 Conn. 479 (1863); State v Marfaudville 48 Wash. 117 (1907).
279. Bohlen, F.H. and Burns, J.J. *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices* (1926) 35 Yale L.J. 525, 540.
280. Thus the writer to some extent agrees with the decision in People v Ceballos 12 Cal. 3d 470; 116 Cal. Rptr. 233 (1974) where the defendant was found guilty of assault with a deadly weapon and his appeal was rejected. The upper court held that the mere fact of burglary did not automatically suffice to justify the shooting of a 15-year old in the face by a pre-set .22 calibre pistol. However, according to the reasoning outlined in the above text, the case does not as such go far enough, for it does not appear to exclude an automated killing in some cases.
281. For France, see Cass., 18 octobre, 1980; Gaz.Pal. 1981.I.308; c.f. Lanham, supra, p. 378, fn. 42.
282. Obviously some situations may be imagined where the use of such devices could be justified e.g. X, alone in his log cabin in the mountains is besieged by a gang of marauders intent on exacting revenge on him for some past transgression. Obviously, he would be justified in setting up a device to counter effectively the ferocity of this threat while he slept. Such situations would, of course, be rare.
283. (1826) Syme 188, and 210 respectively.
284. E.g. Lord Gillies, id. at p. 210: "In principle, I can see no difference between designedly shooting a man, and designedly placing a gun in a situation in which it may kill, and is intended to kill...If it is murder

in the one instance, it is murder in the other, and this is a view of the matter which no ingenuity can elude." C.f. counsel for the prosecution, at p. 196, quoting Hume.

285. (1820) 7 Taunt.

286. Id. at p. 511. And see Johnson v Patterson 14 Conn. 1 (1840) at 9-10: "...the act of the trespasser does not authorise the infliction of injury, by the hand of the owner of the land, when present, on either man or beast. But the guilt of trespassing on the land is no greater in the absence of the owner, than when he is present...If the guilt is not such as justified the injury, how is the justification strengthened, by the manner of inflicting it ?" cited Speziale, M., Is a House a Castle ? (1976) 9 Connecticut Law Review 110, 123 fn.53. And on the implications for the necessity requirement of such a view, compare People v Ceballos, supra.

287. (1820) 3 B. & Ald. 304, per Abbott, C.J. at 310, Holroyd, J. at 314-15, Best, J. at 319-20. Counsel for the panel in James Craw also used the same argument, c.f. U.S. v Gilliam 25 Fed. Cas. 1319, no. 15205a.

288. C.f. Larguier, R.S.C. 1981, 852 at 855, and compare Cass. Req., 25 mars, 1902, supra, and T.C. Aix-en-Provence, 21 avril, 1969; G.P. 1969.II.159; but see now, the Assizes decision in the Legras affair, Cour d'assises de l'Aube, 20 novembre, 1982. Nevertheless, one may only speculate as to the factors which led the jury to acquit.

289. E.g. Bouzat, note sous, *inter alia*, Reims, 9 novembre, 1978; J.C.P. 1979.II.19046; Toulemon, *Autodéfense et Déplacement des Risques*, J.C.P. 1979.I.2922; J.G.M. *Les Risques du Cambrioleur* Gaz.Pal. 23 mai 1978, p238; counsel for the panel in James Craw (1826) Syme 188, at 192; Holroyd, J. in Ilott v Wilkes, (1820) 3 B. & Ald. 304, 316.

290. See e.g. Smart v H.M.A. (1975) J.C. 30; Lanham, supra, p. 376.

291. Counsel for the Prosecution in James Craw, supra, at 199. Also, one may dispose of the argument that such cases may be assimilated to the risks run in the building industry and other such dangerous undertaking; there, the risks created are, though ever-present, entirely secondary to the aims pursued by the work project. And in any case, where gross negligence is shown, criminal liability may issue. Here, the creation of a potentially lethal risk is a deliberate means to a particular end (the protection of property, in the main) irrespective of whether the setter actually 'wishes' the death of an intruder.

292. Where no notice is given, the two situations are, it is submitted, similar.

293. Larguier, R.S.C. 1981, 853, 855-6.

294 Cf. e.g. supra, note 263.

295. This is not the case, though, in some (American) jurisdictions in which the discharge of deadly force devices is permitted where "had the actor been there", the force would have been justified, as in the case of a 'felonious' trespass upon property cf. supra. But, it is submitted, if

such force is proportionate where a felonious entry is involved, then surely the principle should be carried to its logical conclusion, and only gross negligence on the part of the owner should be sufficient to found criminal liability. For presently, in the United States especially, courts are in the curious position of, as it were, acquitting X one day, and convicting Y the next, when both employed identical means. The "felonious trespass" rule, thus applied, suffers from the handicap that "liability depends upon fortuitous results" (Model Penal Code (Tent. Draft No. 8) s.3.06 Com. 15) and really is an illustration of pragmatism taken to its extreme.

296. This is one of the arguments deployed by ~~the~~ some in favour of those who booby-trap by the means of portable devices, such as that used in the Legras affair. Thus, for example, relying on Article 1384 of the *Code civil*, they argue by analogy from the case of a person who has his motor-car stolen by a thief who later is involved in a road accident with it. There, the owner is not liable, for the 'guard' of the object in question has passed to another person - see Romério, F., *Les Pièges à Voleurs et le Droit*, J.C.P. 1979.D.2939.
297. This was the device which was employed with spectacularly efficient results in the Legras affair.
298. See also counsel for the panel in *James Crow*, supra, at p. 193; Best, J. in *Ilott v Wilkes*, supra at p. 320; Alderson, B. in *Jordin v Crump* (1841) 8 New. 782, 787; Tournier, note to Dijon, 21 mars, 1900; D.1901.II.473, 474-5; Lablancherie, *La Légitime Défense*, (thesis) Paris (1909), pp. 32-37; Lambert, *Traité de Droit Pénal Spécial*, supra, p. 131 et seq.; J.G.M. *Les Risques du Cambrioleur* Gaz.Pal. 23 mai 1978, p238; Payen, *De l'Emploi des Engins Automatiques pour la Défense des Propriétés*, (thesis), Paris (1905).
299. E.g. Payen, supra.
300. E.g. Lambert, *Droit Pénal Spécial*, supra, cited Cattan, supra, p173; Donnedieu de Vabres, supra, no. 398.
301. See Cattan, *La Légitime Défense*, supra, pp. 172-4.
302. The full text, as opposed to the truncated excerpt given by, *inter alia*, Romério, in *Les Pièges à Voleurs et le Droit*, J.C.P. 1979.D.2939, reads: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par la loi et par les règlements." (emphasis added).
303. The law relating to guard-dogs is but one vivid example. See also Donnedieu de Vabres, supra, no. 398: "Cette solution est inadmissible. Le droit de propriété n'est pas un droit absolu; il est limité par le droit concurrent des propriétaires voisins, à plus forte raison, par le respect de la vie humaine."
304. *La Légitime Défense*, supra, p. 166.
305. Subject to the present writer's comments concerning the fixed nature of the riposte and the desire for effective dissuasion, supra.

306. S.1903.I.5, 7.
307. D.1970.315, note Cédicé.
308. Similarly, see the decision by the Tribunal de Simple Police de Lagny, 3 février, 1954; D.1954.396, where the accused was convicted of assault upon a 20-month-old baby. He had been irritated by constant trespass upon his property by a neighbouring family, and rigged up a wire carrying electric current, placed, furthermore, close to water, in a wanton disregard for the safety of others whereby the child was slightly injured by an electric shock. Compare *R v Munka* (1964) 1 Q.B. 364, where the accused's conviction was overturned on the grounds that the electrical wire was not an "engine" within the meaning of section 31 of the Offences Against the Person Act 1861. As pointed out by Professor Williams (*Textbook, supra*, p. 518), the court overlooked the traditionally wide meaning attributed to the word.
309. See Chapter 3, *supra*.
310. Cour d'assises de l'Aube 20 novembre 1982 (unreported)
311. The case furthermore presents a most interesting example of the problems raised by the practice of *correctionnalisation* in France, and is particularly relevant to the issue of the French notion of excessive defence. See *supra*, Chapter 3; c.f. e.g. Tribunal Correctionnel d'Aix-en-Provence, 21 avril, 1969; G.P.1969.II.159.
312. And see Perkins & Boyce, *supra*, p. 1160.
313. While the writer holds some reservations about the jury verdict in the Legras affair, it is worth pointing out that in the space of a decade, his country residence had been 'visited' on no fewer than twelve occasions. Not one of his complaints to the police had resulted in a prosecution.
314. The writer therefore holds serious reservations as to the general social implications of the suggestion by some that the possession of large amounts of cash should be outlawed, in an effort to deter crime.
315. See Lanham, (1966) *Crim. L.R.* 368 and (Part 2) 426, at 431: "It should make no difference that the trespasser is a thief because it is not permissible to inflict injuries on thieves without prior warning for the protection of property because until it is known whether the thief will refuse to submit, the infliction of injury will not be reasonably necessary." The issue is somewhat analogous to the question of whether a request to leave is necessary on the part of the owner of property, before he uses force to turn out a trespasser, although equally, one might object that it is more easily assimilated with that of forcible trespassers, against whom one may use force without prior warning; see *supra*.

It will of course be appreciated that the principle does not extend to indicating the exact position of the device - this would defeat the whole purpose of its deployment c.f. *Ex parte Minister van Justitie: In re S v Van Wyk* (1967) (1) S.A. 488 (A.D.), per Trollip, J.A., at p. 515.

316. Indeed, with the increase in international travel, it is arguable that an international symbol indicator could be used, which would visually illustrate the threat posed. A fanciful hypothesis ? See the facts of T.C. Aix-en-Provence, 21 avril 1969, (supra). In addition, the signs would clearly have to be placed in a prominent position, possibly even lit. But much beyond this, the writer will not go, in the imposition of requirements. The indulgence towards intruders can be taken too far, and there is the purely financial side to think of, for the owner. Compare Allison v Esirius 156 Ohio St. 120, 100 N.E. 2d, 237 (1951) where the court took the view that one engaged in 'felonious' entry is entitled to no more notice than given by the lock on the door itself - See Speziale, (1976) 9 Connecticut Law Review 110, 124 fn 54.
317. See the comments of the courts in T.C. Toulouse, 8 octobre, 1969,, and Cass., 18 janvier, 1977, supra.
318. 1967 (1) S.A. 488 (A.D.).
319. Steyn C.J., id.
320. E.g. Lord Gillies in James Cram, supra, at 211; Lord MacKenzie at p. 215.
321. E.g. Best, J. in Ilott v Wilkes, supra, at 318; Tournier, note, D.1901.II.473, 474-5.
322. There does, however, as Lanham points out (supra, p. 426), remain the problem of R v Munks, (1964) 1 QB 364, supra, for such devices would, according to that decision, presumably not fall under the prohibitive scope of section 31 of the Offences Against the Person Act 1861.
323. See e.g. Ilott v Wilkes, supra; Lanham, D. supra, p. 426; Williams, *Textbook*, supra, p. 519.
324. Cf. James Cram, supra, at p. 215; Blackman v Simmons (1827) 3 Car. & P. 138, per Best, C.J. at pp. 139-40 (a bull). For France, Tournier is arguably wrong in the absolutist nature of the rule he sets forth, excluding liability where a dog or a 'passive' device kills or injures.
325. (1827) Syme 210, at 215; c.f. Williams, *Textbook*, supra, p. 519: "...it would not be lawful to train the dog to be unreasonably solicitous of your interests...", and Lanham, supra, p. 426, who takes an even stricter view of the law on the matter. An interesting example of the failure to make the distinction mentioned above is found in Lambert, *Droit Pénal Spécial*, supra, and indeed in Cattán's own rebuttal of Lambert - see Cattán, *La Légitime Défense*, (thesis), supra, pp. 167-71.
326. Bohlen, F.H. & Burns, J.J., supra, (1926) 35 Yale L.J. 525, 535.
327. Amiens, 23 février, 1965; R.S.C. 1965, 421, note Hugueney. Likewise, in Ex parte Minister van Justisie: In re S v Van Wyk (1967) (1) S.A. 488 (A.D.). The case is particularly interesting for its finding in Van Wyk's favour even though a fatality had occurred. The writer would point out however that among the various precautions taken by the accused (a near-bankrupt shopkeeper) was the positioning of the gun in such a way that an intruder was likely only to be shot in the leg.

328. J.C.P. 1967.II.15034, note Combaldieu. See supra, chapter 3.
- 329 Crim., 15 octobre, 1980; Gaz. Pal. 1981.I.308.
330. See the lengthy case note by Larguier, in R.S.C. 1981, 853.
331. Nonetheless, see the fascinating facts of the Coroner's inquest into the death of a Mr. Ellis, reported in The Times 15th July 1789.
332. Witness the speed with which the Pochon affair in France followed upon the acquittal in that of "Les Dames de Jeufosse", supra.

CHAPTER 5

**PRIVATE DEFENCE AND RESISTANCE
TO UNLAWFUL PROCESS**

1. Introduction

We have seen that the right of private defence is dependent upon and triggered by the existence or threat of an unlawful attack. Thus, on the principle that the law cannot without contradiction legitimise the attack and authorise the defence, ¹ the man who is lawfully arrested, or condemned to judicial execution or deprivation of his liberty, cannot lawfully defend himself against those carrying out due process of law. We have further understood ² defensive action to be based largely upon the absence of State protection at this critical moment of attack. With an irony, then, which will not be lost to the observer, the law is faced with a peculiarly delicate problem where the individual finds himself facing an aggression not by a 'fellow citizen' as it were, but emanating from a representative of the very authority from which he expects protection in times of danger; in other word, where he is the object of unlawful behaviour by what one might loosely term an officer of the law.³

It may come as no surprise that the efforts of the English and French courts to deal with the issues raised by such situations have provoked considerable debate and controversy, given the intricacy of the problems which they faced. Yet criticism of both came for differing reasons, and of great interest is the fact that the major jurisprudence of both jurisdictions occurred at virtually the same period in the early nineteenth century, yet led to the adoption of two diametrically opposed stances on the matter of the legitimacy of resistance to authority.

It is a truism to say that it is the law which makes the policeman and not the policeman who makes the law. His powers and duties are, at least in theory, closely circumscribed, and beyond this he is, strictly speaking, but a private individual - no more, no less. ⁴ Furthermore, in keeping with the principle of legality, the law of arrest and detention is characterised by detailed rules, both of substance and of procedure, as a protection to both citizens and police, and in order to curb the scope for arbitrary action by those in authority. In consequence, those cases in English law of justified resistance by individuals have been ones where the police either lacked the power involved, or else had at the outset such a power but failed to observe these rules of procedure.

2. England (and Scotland)

A. Early Law

Whatever the position today, early English law had a distinctly dual aspect in its approach. It cast a special protection ^{around} those entrusted with maintaining the peace, when they acted strictly within their powers, sometimes holding those who resisted them to the most rigorous standards of the criminal law. * However, the corollary which applied was that where they overstepped their powers, in whatever manner, and even in a very slight degree, then one could use force, even great force to resist them. * An illustration, though somewhat extreme, of this principle is found in the early decision in Ferrers's case. 7 There, Sir Henry Ferrers was arrested for debt, and submitted peacefully to the process. In an apparent rescue attempt, however, his servant fought with the arresting officer and killed him. At his trial, he was found not guilty of murder or manslaughter - the apparent reason being the defect in the warrant, which misdescribed Ferrers as a knight, rather than a baronet. *

Such an account may make incredible reading today, and in fact it is rare that one finds cases of homicide resulting in outright acquittal. However, considerable force, short of mortal wounding, was permitted and this remained generally the position well into the nineteenth century. Various reasons have been forwarded in explanation of this judicial attitude, such as the difficulty of obtaining redress, the near-impossibility of receiving bail, and the undoubtedly significant risk of disease prevailing in prisons. * However, the most compelling factor, it is submitted, is simply the peculiar regard of English law, going back many centuries, for the liberty of the individual, and its concern that any infringement upon this be imposed by only the most rigidly lawful means. It is no coincidence that the country of Ferrers's case is also that of Magna Carta and the writ of *habeas corpus*.

Just how much force was permissible may be deduced from R v Thompson 10 and R v Walker. 11 In the former, the accused, a shoe-maker, was refused money by his employer, and consequently downed

tools and went off to a tavern. His employer called a constable, suggesting he had carried off some tools, but in any event no real charges were made out. Nonetheless, the constable went off to find the prisoner and attempted to arrest him, whereupon Thompson, saying nothing, promptly stabbed him. He was convicted and sentenced to death, on an indictment for, *inter alia*, stabbing with intent to murder. However, his appeal was upheld on the grounds that the 'arrest' had in fact been illegal, the court remarking that had death ensued, it would have been manslaughter only. ¹² In Walker, following an altercation between himself and one of his constables, a police sergeant returned to the latter's house to arrest him. As he tried to take hold of him, the accused inflicted upon him a severe head wound with a clock weight. He was convicted on a wounding charge, but this was unanimously overturned on appeal, once again due to the illegality of the arrest.

Where in fact death was caused, the courts frequently turned to the notion of provocation, thus reducing murder to manslaughter. As often was the case, the triggering factor would be an illegal arrest but equally even an attempted detention (thwarted by the individual's resistance) would suffice to reduce to manslaughter. ¹³ Time and again references would be made to the affront to one's person caused by such actions, and thus we find one court declaring that:

"... sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprisons a man he is an offender against Magna Charta. We seven hold this to be a sufficient provocation and we have good authority for it..." ¹⁴

The case was R v Tooley & Orr; ¹⁵ a parish constable had exceeded his territorial jurisdiction, yet arrested on suspicion of disorderly conduct a woman who, it seems, was guilty of no such behaviour and against whom he held no warrant. Some strangers intervened but were placated by the constable. Later, however, they attempted once more to free her; and before receiving any blows they killed one D, whom the constable had called to assist him against their violence. The court judged by a majority of seven judges to five that this was manslaughter and not murder. However, it will be appreciated that in this case, as in others, the facts fell short of the

normal criteria for a successful plea of provocation. '6 An interesting indicator of the 'hybrid' nature of provocation in such circumstances is the practice whereby it seems to have been generally held that the fact that one had pre-armed oneself for the purpose of resistance in no way defeated the plea. '7

Significantly enough, the opinion North of the border was not favourable to such jurisprudence, applying a far more rigid test for provocation, and deeming the mere fact of detention, albeit under illegal process, insufficient to extenuate guilt in the case of killing. '8 Physical violence of some sort was clearly required under Scots law before a verdict of culpable homicide could be supported, and even then it had to be of some materiality. '9 There is a marked scarcity of Scots writings or decisions on the matter of resistance as such to public officers acting other than under legal warrants, but it is worth noting that nothing expressly rejects the principle of resistance, be it only passive, in such situations.

B. Critique of Early Law

One has the distinct impression that in England the courts used the concept of provocation as a legal fiction on which to hook the extenuated guilt which was, in their eyes, characteristic of an accused who went so far as to kill in resisting an unlawful arrest. For it seems that, at least by the mid-nineteenth century, killing could never be justified by the mere circumstances of illegal detention or an imminent threat thereof. In other words it was always *disproportionate* according to the principles of private defence. Thus, if one accepts even the existence of a qualified plea of self-defence in certain cases ('excessive defence' 20), resulting in a manslaughter verdict due to an ill-temporised response, the authority presently available suggests, it is submitted, that it could only avail the accused where a killing could stand any chance in the circumstances of being considered proportionate in law to the harm threatened 21 - which was not the case here. The only viable option consequently was provocation - but on a rather liberal interpretation of that plea. Resistance to unlawful process up into the nineteenth century, particularly in the case of homicide, offered a perfect example it seems of the judiciary substituting pragmatism for

principle, having settled at the outset that the liberty of the individual and the notion of strict legality were to a large extent the determinant factors. ²²

The most basic and obvious criticism one may make of the early approach, therefore, is simply that it allowed individuals far too much scope to use violence in resisting public officers who acted unlawfully. One may not unreasonably feel that whatever the indignation and offence given by an illegal arrest, and whatever the censure merited by the constable for acting beyond the limits of his powers, this could not reasonably justify, *inter alia*, the infliction of a severe head wound with a blunt instrument; ²³ stabbing; ²⁴ or slashing on the face with a knife. ²⁵ Further, the possibility of liability for his illegal actings does not as such bear upon any right to use such force against the officer, for (a) as has been stated, punishment is not the true rationale for legitimate defensive action, and (b) even where resistance is allowed, it is subject to the basic requirement of reasonableness, or more specifically, necessity and proportion. Here, then, one may argue that such force was disproportionate, and one may further doubt whether in some cases it was necessary either. In some respects then the principles of the criminal law were interpreted more favourably to the accused than usual, to the prejudice of the public officers.

No more was this obvious than with the use, mentioned above, of the plea of provocation, whenever death had ensued. A mere touching, as a prelude to arrest, could justify the use of non-deadly force, and reduce a killing to manslaughter. ²⁶ That in some cases a mere technicality could trigger such responses and preclude or extenuate criminal culpability was arguably to permit justification and provocation to occupy territory in the criminal law into which these notions had no call to stray.

But if one finds such particular instances questionable, then doubly so are those cases which involved defensive action not by the arrestee, but by intervening third parties - would-be 'rescuers' - a fairly common occurrence. ²⁷ Such actings were particularly controversial when, as happened on some occasions, the arrestee had already peaceably submitted to the illegal process. ²⁸ There are two major objections here. Firstly, one may question not only the notion that mere detention would suffice in law as

provocation, but that even total strangers might react to such an 'affront', and that if they killed, they would benefit from a reduced plea. Such doubts, expressed by the minority in Tooley's case, however, found little favour with their brethren who declared that:

"... if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion ... and where the liberty of the subject is invaded, it is a provocation to all the subjects of England." 29

Secondly, and surely more damningly on the facts, is the criticism that in some cases the rescuers would be perfectly unaware of the illegality of an arrest given the subtlety of the law on this matter, 30 and so would benefit from a 'windfall' technicality which they could not have appreciated at the time. The majority in Tooley, however, rejected this, for *"surely ignorantia facti will excuse, but never condemn a man."* With such a proposition one may reasonably take issue, and indeed subsequent caselaw controverts such an absolute statement, 31 partly on the reasonable principle that one should not always be able to benefit from good fortune to escape liability from 'otherwise' criminal activity. Rather, the writer prefers to follow the words of Foster, J., who in a spirited denunciation of the majority opinion, wrote:

"... This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta and the laws; and in this frenzy to have drawn upon the constable and stabbed his assistant; it is difficult to conceive that the violation of Magna Charta, a fact of which they were totally ignorant at the time, could be the provocation which led them into this outrage ..." 32

As for the argument that it was, given the period, very much in the accused's interest to avoid incarceration, ³³ the flaw in the reasoning is self-evident. We are able to comment on the above cases precisely because the individuals were brought to trial, though not necessarily for the original offences, but for the resistance they put up. They certainly reached prison (awaiting trial) by a different route, but the end result was the same, incarceration - that which they had most earnestly sought to avoid. And the possibility that there are instances which never came to court because constables, despite having received violence (especially grievous bodily harm, which so frequently appears in the reports) duly retreated and renounced all efforts, by reinforcements or otherwise, must surely be negligible, if not almost fanciful.

Undoubtedly, the courts, imbued with the spirit of Magna Carta and 1688 were keen to uphold the principle of legality, but one cannot help thinking that the price that law-officers - indeed, the law itself - paid for scrupulous attention to this ideal was both unnecessary and unreasonable. Reading some case-reports one has the image of a constable treading his way along a narrow, albeit visible, path through a minefield, where the consequences of a deviation from the prescribed route, whether intentional or not, were swift and severe. Such an approach, particularly cruel where the officer would be acting in good faith ³⁴ furthermore may be criticised for the unwelcome example it offered to the public at large; for while it would not exactly actively encourage resistance, it would at least hardly inspire them to show the ideal level of respect for the badge of authority.

Not surprisingly, as the nineteenth century progressed, qualifications were gradually applied to earlier law. Thus we find one court apparently doubting, in contrast to earlier authority, whether pre-arming to defend oneself was compatible with a reduction to manslaughter by way of provocation. ³⁵ And the restriction on provocation continued, so as to require a more overt show of force or violence by the arrester, before it could avail, ³⁶ with furthermore two major cases in the 1860s significantly tightening the rules, the first indicating that where on an arrest the warrant was *prima facie* valid, then resistance was not allowed at all, ³⁷ while the second, yet another rescue case, which resulted in the death of one officer, involved the trial judge directing the jury to convict of murder, and

then, on consultation with his brethren, refusing to reserve a case, even though it appears that the original warrant was in some respects defective. 39 Indeed, an indication of the shift in the law in this point is found in the fact that by the middle of the nineteenth century, two courts had openly disavowed the decision in Tooley, declaring it expressly to have been overruled. 40

C. Modern Law

The modern law of England continues nonetheless to reflect the fact that the principle of resistance to unlawful action by officers of the law has never really been questioned. What has changed, however, is the degree of force considered justifiable; in other words, the scale of reasonableness. This principle is nothing particularly new; merely what is considered reasonable has altered with time, and undoubtedly the individual has far less scope for violent action than before. Continuing the developments of the later nineteenth century caselaw, it is now the case that the mere fact that an arrest is illegal will not automatically constitute sufficient provocation to reduce a killing to manslaughter. 40 In Kenny's Outlines we find that the individual

"... certainly will not be justified in maiming or killing the illegal arrester unless the attempted arrest took the form of an attack of a deadly character ..." 41

Now, as a descriptive statement of the law of self-defence in general, this assertion is beyond dispute. However, consider in this particular context the implications of the above, if taken at face value. Imagine X, whom Y attempts to detain on an irregular warrant. He resists, with mild force, which prompts Y to employ greater violence in order to overcome him. The confrontation thus increases in tempo, until Y, insisting on ensuring the performance of his 'duty', employs serious violence against this highly dangerous arrestee - whereupon X, in defending himself, fatally stabs Y. Such instances would no doubt be rare, but it is the writer's contention that the above approach, or rather the premise on which it is based, is

unacceptable, creating as it does a dangerous potential for pitched battles between individuals and police officers - equally determined in good faith to assert their respective 'rights' or 'duties'. ⁴² Nevertheless, one may take it as certain that today one is never justified in killing a police officer in order to prevent an arrest as such, however illegal it may be, where this is the only harm one faces.

What form then, does this modern-day right of resistance take ? Accurate comment is rendered difficult for two major reasons, both connected. The first is the scarcity of caselaw on the matter of justified assault as such upon police officers, which means that deductions as to the attitude of the judiciary have to be made by a more indirect interpretation of caselaw than is desirable, and frequently by reliance upon statements made *obiter*. The second reason, which explains the first, is the introduction into the law by statutory means of the offence of assaulting a police officer in the execution of his duty, ⁴³ and the consequent preference in England for prosecuting under this head, which is, though more serious in its implications than a charge of common assault, paradoxically now only a summary offence.

However, one or two cases do meet the matter somewhat. In Kenlin & Another v Gardiner & Another, ⁴⁴ the conduct of two schoolboys, though in reality innocent, aroused the suspicions of two plain-clothes police officers, who approached them in order to question them. The boys apparently did not believe or realise that they were policemen, and in their efforts to get away physically resisted attempts to restrain them. Convicted under section 51(1) of the Police Act 1964, ⁴⁵ they appealed successfully, it being held that the action of one of the constables in taking firmly by the arm one of the appellants, in order to question him but not to arrest him, constituted an assault which entitled both boys to resist with reasonable force. ⁴⁶ While it is possible to interpret this case as really more relevant to the issue of reasonable error of fact, ⁴⁷ the *ratio* actually centred upon the illegality of the officers' actings and so far as the question of unlawful behaviour by the police is concerned, the resistance which it seems was considered reasonable (the onus of disproving this of course resting with the Crown) ⁴⁸ included, on the facts, several strong punches to the chest and violent kicking.

Likewise in R v Yvonne Jones.⁴⁹ There, following a disturbance over a parking-space, a middle-aged lady was arrested and taken to a police station, where, on her refusal to accede to requests, a magistrate's order was obtained for her fingerprints to be taken. However, the operation was then attempted not at the courthouse but, contrary to the order, at the police station itself; she resisted vigorously, kicking and biting two police constables, and her convictions on, *inter alia*, two counts under section 51(1) of the Police Act 1964 were quashed on appeal, her resistance being held justified, since due to the defect, the police officers were not "carrying out the order" and so were acting unlawfully. Significantly, in allowing her appeal, the court seems to have accepted that the force used was reasonable in the circumstances. ⁵⁰

This latter case touches especially upon the second aspect of judicial attitudes in England towards the question of private defence against the police. This lies in the strict interpretation which they repeatedly take of the notion of 'duty', whenever the statutory assault upon an officer is charged. With regrettable frequency and regularity, both the choices made by prosecuting authorities and the rigorous strictures of the legislation concerned lead to convictions being quashed, or prosecution appeals rejected, by upper courts which find that by some irregularity, great or small, the police officers assaulted were not acting "within the execution of their duty".⁵¹ In this respect, then, the law has changed little in several centuries.

An illustration of this is to be found in Ludlow & Others v Burgess.⁵² There, a police constable was kicked on the shin as he boarded a bus, an act he believed to be deliberate, but which the appellant, one of three youths present, contested in particularly colourful terms. The constable, who did not have his warrant-card told him to stop using foul language, informing him he was a police officer, and as Ludlow walked away he put his hand on his shoulder, not to arrest him, but merely to detain him for further inquiries. Ludlow thereupon struggled with him and kicked him, and his two companions then assaulted the officer. Convicted under section 51(1), Ludlow appealed successfully, the court holding that the detention of a man against his will without arresting him was unlawful, and a serious interference with a citizen's liberty. ⁵³

A similar conviction was overturned on appeal in the case of Hickman v O'Dwyer.⁵⁴ There, a noisy, though not disorderly group of youths congregated in an arcade, had been told to move on by the police. This injunction was repeated, and the defendant, who was lying on a seat, began to get up slowly and deliberately, upon which a constable took him by his arm, refusing to release it despite his protests. A struggle followed, and the defendant struck the constable in the stomach several times. It was held there was no evidence to support the conviction.⁵⁵

Although it must be stressed that the cases involved a charge under section 51(1), one may not unreasonably question the propriety of a jurisprudence which admits of the principle of physical resistance in such cases, but that is the law as it stands, and it is clear that English courts in particular continue to guard most jealously the liberty of the subject from even the slightest unauthorised physical interference. And even though on some occasions the courts may have, on the facts, disapproved of the degree of force used by individuals against the police,⁵⁶ the principle of resistance remains clearly intact. Thus even a mere touching may still give rise to a right of riposte, albeit less violent than that permitted in the older cases.⁵⁷

Nonetheless, even where the officer acts outside the execution of his duty, and therefore gives the citizen (apparently unwittingly, in most instances) the right to defend him or herself, it must be appreciated that there still remains the question of the twin standards of necessity and proportion, which still apply to any defensive force, as in other situations.⁵⁸ However, where the assault on the statutory charge was rejected, the appeal courts have in the past been regrettably slow in suggesting that the violence inflicted upon the officer may have exceeded the bounds of necessity and proportion, and therefore constituted a common assault. While this may well be explained by a reluctance to decide upon points not directly before them,⁵⁹ one may nevertheless regret the scarcity of dicta on such a crucial and pertinent matter.

As for the scope of one's defensive right, it is, as in private defence between totally 'private' individuals, not restricted to protection against physical attacks. Thus the interest of the police in entering private

property is constrained somewhat by the law relating to trespass, and police officers, just like private citizens, may find themselves subject to the same rules covering this branch of the law.

In Davis v Lisle ⁶⁰ two police officers, without a warrant, and without obtaining the appellant's permission, entered his garage premises in order to make inquiries about a suspected vehicular obstruction. The appellant, in highly picturesque language, ordered them to leave, and when Constable Lisle, in a (legally meaningless) show of authority produced his warrant, Davis lunged at him, striking him in the stomach and chest. His convictions for statutory assault and wilful obstruction of a police officer ⁶¹ were reversed on appeal, as at the material time both officers were trespassing. ⁶²

Thus, the police are presumed to be invited - as are all visitors who have lawful reason to do so - to at least enter onto property, ⁶³ but, in the absence of further authority (for example, a warrant), from the moment the licence is revoked they become trespassers and are bound to leave, failing which they may be turned out. ⁶⁴ More importantly they are, if they stay, no longer acting within the exercise of their duty. However, as with ordinary trespassers, any force in removal must be necessary and proportionate - the owner must first request them to leave, and even then he has to allow them reasonable time to do so. ⁶⁵ Any force then applied must of course be reasonable in the circumstances.

This power of revocation, though, remains subject to any overriding right or duty which a constable may have to proceed onto the property. Hence it was held that a licence to enter granted by a woman could not be unilaterally revoked by her husband - the subject of the complaint in a domestic dispute - so as to render the officers trespassers from then on, for it was implied that the licence extended not only to a right to enter, but to remain there long enough to ensure the safety of the complainant (and her children), and for the police to satisfy themselves that there was no reasonable fear of a breach of the peace. ⁶⁶ *A fortiori* this would apply where the police see a breach of the peace taking place before their very eyes. ⁶⁷ In such cases, then, resistance would be unjustified.

The instances of either justified resistance, or rejection of a conviction of statutory assault, remarked on above, all show that conformity to the law, difficult enough for the private individual, when engaged merely in, say, leisurely and occupational pursuits, may prove equally difficult of achievement for the police officer, who is constantly called to apply the law, and in addition will be motivated to pursue his actions fully to their end by the awareness that with his office come not only powers but also duties of enforcement.

The law of arrest is indeed very complex and so the police officer is often at an advantage over the layman in a confrontation. But with power comes responsibility, and so equally his special knowledge may result in him being held by the courts to a higher standard of perspicacity and professional behaviour. As one judge put it:

"The private individual is entitled to expect that a police officer is aware of the general nature and extent in law of his powers and correlative duties." 66

And it would seem that an honest and reasonable belief by a policeman that he is acting within the execution of his duty cannot affect the illegality of his conduct - and hence on present law, the right of resistance - if this is not in fact so. 67

It is still the case that the police have no general power to detain individuals for questioning, 70 and the consequent right of defence which arises where this rule is not observed, is well demonstrated by the decision in Kenlin v Gardiner & Another. 71 Equally, the justification of self-defence is available where the police do *prima facie* have a power to act, but exercise it in an improper manner. 72 A prime example of this is to be found in the case, examined above, of R v Yvonne Jones, 73 which furthermore, shows the application of the principle of resistance to acts other than illegal arrest or detention. The notion of improper performance of one's duties includes, similarly, the use of excessive force by the police, and one clearly has there a right to resist; the delicacy of this issue,

however, must be obvious to the reader, and consequently, as has been pointed out elsewhere, ⁷⁴ in such cases there are formidable problems of proof.

The strict attitude of the courts is similarly present in the case of arrest procedures, and where it has not been made quite clear that the individual is no longer a free man, then convictions of statutory assault run a high risk of being reversed on appeal. ⁷⁵ Nonetheless, one may agree with Professor Williams that the citizen would be ill-advised to resist what he presumed to be an illegal arrest, ⁷⁶ given the complexity of police powers, ⁷⁷ and given the fact that these are, understandably, often framed in terms of 'reasonable belief' on the part of the arresting officer. Hence, the fact that one is innocent in no way automatically makes one's arrest illegal, and *a fortiori*, an acquittal on the original charge laid will not of itself create an illegal arrest.

It is further probably true, as Professor Williams states, ⁷⁸ that the safest ground of resistance is that the officer has not stated the grounds for the arrest, which is really a fundamental requirement whenever someone is deprived of his liberty and taken into lawful custody. ⁷⁹ Other than being seen as an example of the principle of legality in practice, and a curb on arbitrary official action, the rationale of this requirement seems to be so that the suspect may have the opportunity of clearing himself of the charges. ⁸⁰

Another compelling reason for the requirement derives from the fact that one has a right to resist when one believes on reasonable grounds that one is being accosted not by policemen but by thugs. ⁸¹ And the officer's protestations do not automatically vitiate this right, for they may reasonably be taken to be a pretence. ⁸² This is simply an application of the normal principles of law relating to error of fact. But a reasonable error of law will not generally provide a defence; and considerations of this nature enter in some situations where both questions of fact and law become somewhat intermingled. ⁸³ It is not always enough to show that one reasonably believed that the person was not a police officer - for in certain situations private individuals may have a right of arrest too.

This is well shown by the case of Albert v Lavin ⁶⁴ which we considered in Chapter One. There, it will be recalled, following a disturbance arising out of queue-jumping at a bus-stop, the appellant was convicted of assaulting a constable in the execution of his duty. He appealed, on the grounds that he had genuinely believed (albeit unreasonably) that the plain-clothes constable who had intervened to restrain him was not a policeman, and so he was justified, or at least excused, in relation to his resistance. This was soundly rejected by the House of Lords, which summarily declared his error of fact to be quite irrelevant to the appeal, for *in law*, any private citizen had the right, indeed duty, to act to prevent or terminate a breach of the peace. ⁶⁵ While private arrestors, true, often act at their peril, the case demonstrates well the risks one takes in resisting on a first-blush interpretation of the law. ⁶⁶

D. Appraisal of Modern Law

As we have seen, then, modern law has taken a perceptibly more restrictive view of resistance than earlier cases. But, in addition to the limitations outlined above, there are signs appearing in individual cases, that, even by present-day standards, some courts are progressing, very gently, towards a stricter attitude to the use of force against police officers, where they acted at least ostensibly within the scope of their duties. This has been achieved by two different means. Thus in Donnelly v Jackman ⁶⁷ a police officer sought to make inquiries about an offence and requested a suspect to stop, without success. After repeated requests, he touched the defendant on the shoulder, which prompted the latter to tap him on the chest, indicating that they were now 'even'. Once more the officer touched him on the shoulder, intending merely to stop him and speak to him, whereupon the defendant struck him with some force. The latter's appeal against conviction under section 51(1) was dismissed; it was held that in so acting, the policeman was within the execution of his duty, the court declaring that:

"... it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties." ⁶⁸

Equally, where the police were admitted by the courts to have been acting unlawfully, the latter have suggested that the permissible resistance is limited to only the slightest use of force. Thus, in Lindley v Rutter, ²⁰ where the appellant had forcibly resisted having her brassière removed (a safety precaution while in police custody) the Court of Appeal, while allowing her appeal against conviction for the statutory offence of assault upon an acting police officer, nevertheless observed, *obiter*, that she had been guilty of a common assault upon the woman police constable involved - the court, incidentally, remarking that she had used more force than was necessary, a curious rationale in the circumstances since the brassière had in fact been removed. ²¹ There are signs that the courts are slowly becoming more vocal on this point, and more willing to address themselves to the issue of whether a common assault is made out. ²² And in one relatively recent case the Divisional Court made it quite clear that it wished to see this latter charge brought more often, where technical challenges to the officer's authority could be anticipated. ²³

While such cases by no means constitute a turnaround in jurisprudence, they are significant in their indication of the concern of some higher courts that the law relating to resistance to authority may be set, even today, too much in favour of the individual, in one way or another. However, they can in no way be taken to assert that one may never resist illegal and oppressive acts committed by those in a position of authority.

This principle of resistance, be it a last resort, is to most people a regrettable, though sometimes necessary, component of any form of social existence, the most extreme form of which is mass insurrection by a civilian population in order to overthrow a despotic régime. ²⁴ Such actions in the extreme really assert that civil society is ultimately based on a bilateral relationship of respect between on the one hand the State, ever mindful of the rights of its citizens and faithful to the principle that far from being above the law, it is at the end of the day, in a free society, bound by it; and on the other, the individuals who, it will be noticed, provide the foundation of the State, obedient to the lawful exercise of its authority, be this ever so disagreeable. But where the former oversteps its authority, we see this relationship reflected in a two-way tension between the parties and

interests involved. This was well caught by Channas, who, in his remarkable study of private defence, stated:

"... n'est-il point dangereux dans une société organisée d'armer l'individu d'un droit de résistance qui lui permettrait de l'opposer aux ordres de l'autorité, au pouvoir ? Mais n'est-il point injuste d'autre part, de proclamer que l'Etat peut violer sous les regards passifs de leurs titulaires, au nom du principe de l'intérêt public et de la discipline sociale sans pouvoir réagir sous la menace de la répression ?" 24

(Original emphasis)

And we may agree that in principle the right to resist illegal acts constitutes the indispensable counterweight to the duty of obedience to lawful authority, 25 in a relationship where it is curiously difficult to separate exactly who, as it were, wields the carrot, and who the stick.

Yet one might question the propriety of a sweeping application in practice of this principle. In a period when, arguably, the healthy questioning of societal values of recent times has been replaced in some spheres by the recurrent phenomenon of an unreasonably cavalier attitude to authority in any guise, and when assaults upon the police are reaching alarming proportions, 26 one may well wonder whether it is reasonable to permit forcible resistance in cases where not only is the 'assault' or 'imprisonment' merely technical, but crucially, it occurs at the hands of an acting police officer; for surely common sense will tell us that generally one has far less to fear from a policeman who attempts to restrain one against one's will, by a hand laid firmly on a shoulder, than from a private individual whose similar action will often be a prelude to something far more sinister than 'further inquiries'. Furthermore, the police officer will frequently be acting entirely in good faith, 27 unaware of his want of authority, and the potential this often creates for wholly unnecessary confrontations seems to militate in favour of some sort of restrictive approach. 28 The writer fully agrees with Professor Williams that:

"(t)here is, therefore, a head-on clash between the idea that the citizen can use force to prevent illegal action against him by the police and the proportionality rule." 99

And reading the caselaw, one is, it is submitted, left with the distinct impression that in instances of technical assault and imprisonment, in this day and age lofty judicial pronouncements evoking an Englishman's liberty are somewhat misplaced. 100

Admittedly, a policeman does act "at his risks and perils" in performing his various tasks, but the question is, "Do these risks necessarily include (justified) assault where he oversteps the limits of his powers?" In our examination of whether the one follows inexorably from the other, the position taken by the French courts in the matter is of particular interest.

3. France

A. The General Principle

If there is one fault of which the *Cour de cassation* may not be rightly accused in this matter, it is that of inconsistency. For the Supreme Court has, over the past one hundred and sixty years or so, maintained (with isolated exceptions) an outright prohibition of resistance to even illegal acts committed by those in authority, an attitude which, not surprisingly, animated continued controversy.

The Court's position became established by the early nineteenth century; 101 and within a decade of the enactment of the *Code pénal* came a decision neatly capturing the basis of the Court's thinking which has dominated to this day. 102 In Cr 5 janvier 1821 (Bernard), 103 the accused had been convicted of *rébellion* for resisting a police officer who had tried

to arrest him without a warrant and with no other authority. His *pourvoi* was rejected by the Court, which reasoned thus its decision:

"Considérant ... - Que la circonstance que le commissaire de police, en ordonnant l'arrestation du demandeur, serait, comme celui-ci le prétend, sorti des attributions de ses fonctions, ne pouvait rien ôter au caractère du délit de rébellion déterminé par l'article 209, puisque cet article ne subordonne pas son application au plus ou moins de régularité dans les ordres émanés de l'autorité ¹⁰⁴ pour faire agir la force publique; que l'illégalité de ces ordres pourrait seulement donner lieu à la prise à partie ou à des poursuites contre les fonctionnaires qui les auraient donnés; ¹⁰⁵ mais que cette illégalité ne peut, en aucun cas, autoriser un particulier à s'y opposer avec violences et voies de fait; que le système contraire qui conduirait directement à autoriser chaque particulier à se constituer juge des actes émanés de l'autorité publique, serait subversif de tout ordre public; ¹⁰⁶ qu'il ne serait fondé sur aucune loi, et qu'il ne peut être admis." ¹⁰⁷

(emphasis added)

Let us then examine the three main reasons forwarded by the Court to support its stance.

1. The Text

This rationale uses as a starting point Article 209 of the Code pénal which punishes as the crime (or *délit*) of rébellion, forcible résistance against officers of the law, and plays on the fact that the provision did not expressly require the action to be legal, for the offence to be made out. ¹⁰⁸ It is indeed highly significant firstly, that the text merely speaks of officers acting "pour", not "dans", the execution of the law; secondly, that the article, modelled on the previous Code pénal of 1791 nevertheless failed to incorporate fully the latter's precision on this question of legality; ¹⁰⁹ and thirdly, that the present Code was drafted during a highly authoritarian

period of France's history, when Napoleon Buonaparte was then Emperor, and had so consolidated his power that all authority was ultimately concentrated in his hands. '10 There is, consequently, every reason to suppose that the *Cour de cassation* was quite correct in its assertion that the legislature had not set, as a prerequisite to the offence of *rébellion*, the exact legality of the particular act of the officer in question. '11

However, while the principle of a restriction of the normal rules of private defence may arguably have its place, what is highly controversial is the practical rule which the *Cour de cassation* had proceeded to fashion from Article 209. For, in widening to an unprecedented degree the meaning of the text, and possibly as a result of misgivings about the ambiguity in its wording, '12 it established a virtually absolute presumption of legality, a far surer base for its doctrine of *passive obedience*. Now, there is clearly nothing objectionable in a presumption which casts protection around public officers, but the proposition that all acts of a policeman are presumed to emanate from a competent authority, particularly where this presumption is not open to rebuttal, is surely unacceptable.

Firstly, there is a world of difference between a presumption *juris et de jure*, and a presumption *juris tantum* - and this becomes all the more acute in the sphere of criminal law where legal fictions are often at best absurd at worst highly inequitable when applied against the accused. Secondly, this absolutist formulation of the law flies in the face of the fundamental principle of the criminal law that incriminatory provisions are subject to the rule of strict interpretation, rather than construed as widely as possible to the detriment of the accused.

Let us be clear on one thing, though. The above jurisprudence did not cast protection around all acts of certain individuals, merely by virtue of the fact that they also happened to be, at certain hours of the day, acting policemen, *gendarmes* or bailiffs: for this would be to endow them with an immunity exceeding that enjoyed, by convention, by even the most scurrilous of foreign diplomats. Hence, acts performed without even the most diluted colour of authority have never as such been covered, and the courts have usually been careful to make some reference to the action being somehow linked to legal orders. '13 And, a *fortiori*, resistance is permitted where

the accused believed on reasonable grounds that he was being attacked by a private individual. '14. But even granted this, there still remains the objection that the general principle, employing the expression "en aucun cas" is too wide and too sweeping to be readily admitted in any system of criminal justice worthy of that name, and one cannot help but feel that the alleged association between the acts performed and 'legal orders' was in some cases tenuous in the extreme, and constituted a somewhat flimsy justification of the Court's stance. And it is surely a fallacious argument which points to the relative positions that articles 209 and 328 occupy in the *Code pénal* '15 as justifying such a drastic modification of the usual rules of private defence, for the principle of private defence is, at least so far as crimes against the person and property are concerned, of a largely general character, operative to justify a whole variety of offences. '16

But the most fundamental objection to the above absolutist reasoning is also the simplest. Namely, that it is wholly contrary to natural law, the operation of which cannot, arguably, in its essentials be modified or restricted by positive law. Any arguments to the contrary are surely vitiated for failing to recognise this basic principle, and one may only speculate whether, had Mr. Justice Foster had the opportunity to scrutinise decisions such as that in *Bernard*, he might not have found that the fault of the court was to employ "pomp of words and the colourings of artificial reasoning" in order to deny what is clearly the undeniable.

11. The Availability of Legal Redress

The second argument forwarded by the Court, and frequently repeated, is that the citizen may, if needs be, seek legal redress after the event rather than 'do justice' himself on the spot. '17 French courts, leaning on the presumption of legality, point to the availability of recourse either in the civil or administrative sphere as a sufficient substitute for resistance. The availability of criminal sanctions against public officers is sometimes cited as well, '18 but if such argument is taken to dispose of the matter, then the flaw is abundantly clear to all. For example, Article 304 of the *Code pénal* punishes murder - but that in no way detracts from the right to defend oneself against homicidal attack - quite the opposite. For, need it

be repeated, the prime basis of self-defence is not punishment, and someone who resists the illegal action of a policeman cannot be taken to be punishing him for his improprieties. ¹¹⁹ Prevention is the real issue. Besides, as one writer put it:

"... réparer est peu de chose en aussi grave matière, l'important est de supprimer le mal au plus vite, ce qui ne se fait que si les intéressés détruisent immédiatement l'obstacle dont ils souffrent." ¹²⁰

(original emphasis)

And it is not clear how recourse to the courts can always repair the damage done by such illegal action - although the writer would, as we shall see later, stress the word "grave" above, in such cases. Where there is room for difference in emphasis is in the precise meaning attributed to this particular term. But that the individual should always carry the burden of going through the courts to redress his grievance, after submitting to a serious violation of his rights is surely inadmissible on any reasonable view. As for disciplinary procedures and internal sanctions, were there such a system which enjoyed real public confidence, the power of such criticisms might be heavily attenuated. But given the grave reservations which many very reasonable people hold as to the willingness or ability of the police, on either side of the Channel, to put their house effectively in order wherever defects appear, the rationale for passive obedience is significantly undermined. Note though again, that it is not so much the notion itself which the present writer finds objectionable; the principle of recourse does, it is submitted, have its place - but what is objectionable is the indiscriminating totality with which the principle has apparently been enshrined by the *Cour de cassation*, in determining that this is, in every case, the only option open to the aggrieved individual.

111. The Policy Argument

Conscious of the dangers to public order which a right of resistance might present, the Court has sought to establish the third foundation for its

principle of passive obedience. An additional factor here is the particular position which a French policeman occupies within the social structure, being identified even more than his British counterpart, as truly an agent of the State. ¹²¹ But this reasoning, too, if seen as absolute, invites heavy criticism.

Firstly, the Court has repeatedly backed up its argument by asserting that it would be intolerable for private citizens to arrogate themselves the right to judge upon the legality or otherwise of a given order. ¹²² However, this misses the point entirely. As Chammas rightly remarks, ¹²³ the individual does not assume the rôle of final arbiter. His decision in the matter is only provisional. He merely acts to defend his rights or interests on an interpretation of the facts and law which will be subject later to examination in court, and there is always the risk that those facts will be found to weigh against him. As Armand Carrel stated in his celebrated trial before the *Cour d'assises de Paris*:

"Si l'obéissance est un devoir pour le citoyen, la résistance, dans l'occasion en est un autre. Je crois, Messieurs, avoir rempli le second de ces devoirs; je l'ai rempli à mes risques et périls. Vous direz si ma résistance était ou non fondée en droit." ¹²⁴

(Emphasis added)

But equally importantly, the alleged benefit to the community as a whole at the individual's expense is wholly illusory. It is not in society's benefit to deny citizens *absolutely* the right to resist the openly arbitrary assertion of authority; it is not in the community's interests to foster a system which unwittingly encourages the police to abuse the particular powers vested in them, in the knowledge that resistance will be punished, and legal redress may be but theoretical; and it is decidedly not conducive to the public good for an individual to be forced to stand by and watch while a serious abuse of his rights takes place, or alternatively, to be punished for having acted in an effort to protect these very rights. It is not surprising therefore that the *Cours d'appel* and inferior tribunals took a more pragmatic approach to the matter, following a more liberal path, at

least up until approximately 1880, when the former, followed eventually by the latter, began to fall in line with *Cour de cassation* jurisprudence. ¹²⁵ And it is from one *Tribunal correctionnel* that came one of the most vigorous denunciations of the absolutist terms of Supreme Court jurisprudence:

"... une pareille théorie, source de perpétuels dénis de justice, aboutirait à sacrifier despotiquement, partout et toujours, les droits du citoyen au respect de l'autorité; qu'elle est inacceptable en pays libre où il est de principe que le citoyen n'est point fait pour le pouvoir ni le pouvoir pour le citoyen, mais où l'un et l'autre sont faits pour que la société soit possible." ¹²⁶

echoed some years later, as the dominant jurisprudence approached a century of authority, by one academic:

"Or, rien ne serait plus immoral ni plus dangereux. S'il faut que les citoyens obéissent, il faut aussi que le pouvoir n'attente pas brutalement à leurs libertés; le peuple chez lequel de tels attentats s'accompliraient sous la protection du Code pénal ne serait pas moins en péril que celui dont les membres auraient perdu le sens du respect." ¹²⁷

B. The Theory of Absolute Resistance

Against this backdrop of Supreme Court jurisprudence and the misgivings which attended it, an alternative approach gained much favour in some circles during the nineteenth century. ¹²⁸ Reminiscent of some of the early English caselaw, the theory of absolute resistance permitted one to resist public officers with force the moment the operations they sought to carry out were tainted by the slightest irregularity. The theory thus placed the highest prime on the principle of legality - carried to the letter.

Various arguments were put forward to support the thesis. Firstly, relying on the above principle, it was asserted that given that their powers are determined strictly by the law - and hence their status depends upon the

latter - when public officers exceed these powers they revert to being mere private citizens again, subject just as any other person to the normal rules of private defence. ¹²⁹ Secondly, the very same conclusion could be reached by analogy from the territorial restrictions placed upon the legal competence of public officers, there being, it was argued, no difference between the two forms of extra-jurisdictional action. ¹³⁰ And thirdly (and most tellingly) several major texts were employed to bolster the theory. Thus the writings of such eminent figures as Jousse ¹³¹ were cited to show that under the *ancien régime*, the right to resist was nevertheless established - and this in a period when *rébellion* itself was so heinous an offence as to be considered a form of *crime de lèse-majesté*, and punished accordingly. ¹³² More importantly, proponents of this theory leaned heavily upon the *Code pénal de 1791*, arguing *a contrario*, that Article I, Section IV, which defined the crime of *offense à la loi*, implicitly recognised the right of resistance. ¹³³ And more spectacularly, they could directly cite the famous Declaration of Human Rights of 1793, Article 11 of which unambiguously asserted:

"Tout acte exercé contre un homme hors les cas et sous les formes que la loi détermine, est arbitraire et tyrannique; celui contre lequel on voudrait l'exécuter par la violence a le droit de le repousser par la force."

Resistance, they argued, thus inexorably followed from the principle that the activities of the State are regulated by the law. But, it is submitted, the error is that this does not inexorably follow. Similarly, it is a fundamental error to confuse, say, any legal or disciplinary sanction a police officer may face, with the existence (or for that matter, absence) of a right of resistance *tout court*. It has surely to be made out, demonstrated - and it is precisely the present writer's contention that the right of absolute resistance cannot be made out. The above argument is theoretically sound, but manifestly unworkable in practice. ¹³⁴ Such an approach would paralyse the machinery of law and order, and furthermore fallaciously supposes that all irregularities are the hand of some cruel despot; the proponents of this theory appear to have forgotten the most basic principle

at work here - to err is human. The theory is, one would argue, manifestly impractical, unjust and dangerous.

Impractical, because of its failure to take into account the realities of everyday policing and to differentiate between the major and minor irregularities of legal and administrative procedure. ¹³⁵ Unjust: to the police, in its failure to discriminate, *inter alia*, between abuses of some gravity, and errors committed in good faith by an unsuspecting officer unaware of the defect in his orders or supposed authority; and to the community, by allowing effective law enforcement - and the protection of the public - to be impeded by the blind pursuit of rules-absolutism. And dangerous, in its potential for breeding confrontation between police and public, where all too often tension will already characterise their undeniably ambiguous relationship. Not surprisingly, modern authority, following no doubt the principle that "*un droit absolu de résistance serait la négation de l'ordre social lui-même*", ¹³⁶ has thus come to reject unanimously the theory of absolute resistance.

4. Criticism of the Above Theories

The above approaches, of passive obedience and absolute resistance, may be criticised precisely for their absolutist nature. The latter constitutes an unworkable and dangerous proposition which falls to be rejected merely on those grounds. English law, equally, is open to some criticism for its justification of force even in cases where the infringement concerned has been very slight. The French courts too, particularly the *Cour de cassation*, have taken an extreme view, which is on occasions most unjust to the individual. Nevertheless, what we retain of value from their stance is the fact that the judiciary in France have at least recognised that the situations of 'private defence' involving only private individuals, and those where unlawful behaviour by the police is at issue deserve different (though, one would argue, not separate) treatment. Every illegality, no matter how small, should not necessarily give rise to a right of resistance, and it is submitted that simple policy considerations demand a place for the doctrine of *rébellion* - in its original form - in both French and English law.

While one would not go so far as to say that "... the only persons who resist illegal arrest are those violent criminals who resist all arrest ...", ¹³⁷ one would question whether, given in particular the onerous burden which by virtue of their office already falls on the police, considerations of public policy truly require that one should have the right to resist the slightest trespass by an officer of the law who is attempting, albeit in irregular fashion, to carry out his duties. One wonders whether, in truth, decisions such as Kenlin v Gardiner ¹³⁸ or even that in Pedro v Dias ¹³⁹ really reflect the ideals and meet the requirements of modern civil society. In one's efforts to achieve fairness to the individual, one should not forget that this ideal applies equally to the police. This is not to justify such unlawful behaviour by the police - merely to question whether the problem is best tackled by authorising physical confrontation on the streets.

As was pointed out earlier, in a great number of cases the officer will be acting in good faith, ignorant of the defect in his authority. Similarly, the citizen has generally far less to fear from a physical intervention by a policeman than by a total stranger acting in similar manner.

There is, partly due to these factors, the objection that a confrontation between a policeman so acting and a resisting civilian carries a special potential for escalation which is not necessarily present in public brawls or assaults between private individuals. This derives from the special duties which a policeman may have either legally, socially or personally imposed upon him, to see that the law is upheld, all of which motivate him or her to pursue their object with greater insistence. One imagines with difficulty a policewoman who achieves an arrest at the cost of being dragged along the street by a car containing several robbers armed with a sawn-off shotgun, ¹⁴⁰ the next day relinquishing her hold upon a protesting civilian who assaults her in order to prevent a technical trespass. And thus we arrive at the futility-of-resistance argument; for in virtually all cases the individual will end up suffering the ignominy of police custody anyway, so effective are police methods these days. Admittedly, this is not a determinant argument, but certainly it militates somewhat in favour of a more restricted right of resistance.

In addition, one may cite the present-day protection of an accused's rights while he is in custody, the right of access, the availability of bail, the ease of communication which precludes the possibility of someone languishing forgotten in a prison cell or jail - in short, the absence of a substantive danger to the citizen in many cases of mildly illegal behaviour - as all supporting some modification, suited to the context, of the normal rules of private defence. Indeed the conclusion seems inescapable that "*(1)1 ne semble pas que la légitime défense ait été conçue dans les rapports entre l'autorité publique et les simples particuliers*" ¹⁴¹ and that natural law in its wisdom left the detail in this special context largely to be fashioned and worked out by positive law. It is here that the reasoning of the *Cour de cassation* becomes more attractive and valid - and the reader will have noticed that the writer has been careful not to condemn outright the arguments of that prestigious tribunal - merely to question the absolutist manner in which they appear to have been applied.

5. The Parameters of Resistance (1)

The question therefore is one of finding the precise criteria for determining at what point resistance becomes permissible - and thus, of setting the dividing-line between the sphere of justified resistance and that where passive obedience becomes a legal requirement. In this search it is particularly useful to look for inspiration to the French writers who, unlike their British counterparts, have written extensively on the subject of 'resistance to the law'.

If one takes as the departure point the premise that this is an abnormal situation which calls for an unusual solution to the difficulties it presents, and that this latter takes the form of a restriction of the traditional view of private defence that all illegal 'attacks', however minor, give rise to a correspondingly measured right of riposte where so necessary, then it becomes obvious that the conditions required for this restricted privilege are more difficult to determine, given the absence of any clearly definable limits. Responding to this, Professors Merle and Vitu, in an effort to improve upon the alleged weaknesses in previous doctrinal theories, formulated a test which as in recent times gained much popularity. Quite

simply, they drew a distinction between the individual's person and property. In the case of the latter, an unlawful entry or seizure would not give rise to legitimate resistance, whereas a physical aggression would permit the citizen to resort to reasonable force. ¹⁴²

Undoubtedly the above approach is crucial in pinpointing the importance of protection against physical harm by the agents of public authority; for to a large extent when we speak of self-defence we speak precisely of action to thwart corporal aggression, which regrettably, is a feature of even the most respected of police forces. It would be both monstrous and socially damaging to deny the right of self-defence to the suspect who finds himself beaten up at home or in a cell by those whose brief is precisely to protect the public from crime, and a *fortiori*, violent crime. One would indeed go further, for it would also be wholly contrary to, and prohibited by, the principles of natural law. And, as Professors Merle and Vitu themselves put it:

"... si des policiers 'passent à tabac' une personne qui se trouve à leur merci, l'acte de l'autorité perd toute apparence de légalité: le 'passage à tabac' n'est qu'une forme de la torture; et le citoyen qui s'oppose violemment à la torture, fût-il par ailleurs le plus méprisable des délinquants, défend l'ordre public et l'intérêt général." ¹⁴³

However, one may question whether the above solution is adequate to cover all situations where justice demands that the citizen have a right of defence. For it is not the case that every 'aggression' against property takes the form of an illegal seizure *tout court*. Suppose I receive the unexpected visit of three police officers, carrying an irregular warrant to search for documents. Aspiring to be a model citizen and to foster the best of relations with my local constabulary, I nonetheless invite them in, whereupon they proceed to tear down and cast aside my Monets or my Gainsboroughs, and smash my prized collection of Sèvres porcelain, in a grossly slovenly if not thoroughly malicious execution of their operation. ¹⁴⁴ Am I expected to stand passively by as the precious contents of my home are slowly destroyed? The criticism one may level, then, at the

above approach is essentially that it achieves greater certainty of the law at the expense of justice to the citizen - and to society - in individual cases.

Garçon too, seems to take a somewhat similar approach, concentrating as he does on the text of Article 186 of the *Code pénal*.¹⁴⁵ The problem again is that this provision only punishes, as an aggravated offence, the use of illegitimate violence by public officers towards *individuals*.¹⁴⁶ Equally, then, this approach may be faulted for being too restricted in its application of the right of resistance, understandable though it is, given the deep controversy in both doctrine and jurisprudence as to whether the principle of defence of property as such existed at all.¹⁴⁷ But in any case, it is not entirely clear that the absence of the "*motif légitime*" on the part of the policeman, mentioned in the article, necessarily gives rise to a right to resist - some caselaw does indeed seem to suggest this.¹⁴⁸ Article 186 certainly constitutes one component of the right to resist, but not, it is submitted, the entire framework.¹⁴⁹

Other theories have laid emphasis upon the external trappings of authority as a useful means of distinguishing between those cases where resistance is legitimate and those where the law requires compliance. Hence, of great importance is the issue of whether the officers in question hold '*titres*', that is, some form of warrant or order *prima facie* granting them authority to perform the acts they allege to be within the exercise of their duty. Thus Isambert, writing in 1826,¹⁵⁰ suggested that where the officers held a warrant, then obedience was due them, even if it was somehow defective, a formulation which was taken up by countless writers since.¹⁵¹ As an example, were the warrant to have been signed by a magistrate who had no authority to grant such an order, the defect would not in itself be enough to justify resistance - "*Un vice du titre ne suffit pas à légitimer la résistance à l'acte de l'autorité.*"¹⁵²

This formulation is particularly useful in its reference to specific, identifiable characteristics of the officer's behaviour which help to determine whether resistance may be allowed. However, one would, with respect, question the extent to which some writers place reliance upon this as a criterion, suggesting as they do that even where the policeman acts

"within the sphere of his functions" (a rather more fluid expression than "in the execution of his duty"), if he has no titre, then resistance is again permitted. ¹⁵³ Each case would surely have to depend on its merits, rather than operate according to such a rigid and inflexible rule. But in any case, the above standard again suffers somewhat from over-precision, for it can only be taken to form one possible example by which resistance becomes justified - indeed some writers employ it precisely by way of example, which arguably serves to underline the writer's contention that, useful as it may be, it does not offer a comprehensive gauge for determining the legality of resistance in any given situation.

And it is this last aspect which is important. For in short, the above theories and their various subsidiaries do all contribute something to the search for a satisfactory means of isolating those situations where resistance is justifiable. They fall not to be rejected, but rather, considered in perspective as components of a larger framework which is, unfortunately, rather less precise in structure than these individual theories which purport to constitute alone, the solution; but one which, in compensation, offers the adaptability somewhat lacking in the former, and which is so vital to achieving a proper balance of fairness to the three parties concerned in this complex - the citizen, the police and society as a whole.

But before proceeding to examine this wider concept that the above theories have been in various ways articulating, it is necessary for us to look to the cornerstone upon which our analysis of the criteria of resistance - or its prohibition - is built; the principles of which may be applied in our proposals for change, both in French and English law.

6. Re-appraisal of Article 209

The key, it is submitted, lies quite simply in the text of Article 209 itself. The basis of a reasonable and workable approach, which would attenuate both the rigour of the English law in its staunch protection of individual liberty, and of the French courts, in their implacable refusal to admit of any significant right of resistance, is contained in this provision of the

Code pénal, almost two centuries old, yet which, one suspects, has been ironically neglected amidst the fury of the debate among the courts and the doctrinal writers. For there is nothing wrong with the provision. Quite the opposite. Rather, it is the questionable use made of it, notably by the courts, which has somewhat discredited it in the eyes of many. Let us examine it closely. It states:

"Toute attaque, toute résistance avec violences et voies de fait envers les officiers ministériels, les gardes champêtres ou forestiers, la force publique, les préposés à la perception des taxes et des contributions, les porteurs de contraintes, les préposés des douanes, les séquestres, les officiers ou agents de la police administrative ou judiciaire, agissant pour l'exécution des lois, des ordres ou ordonnances de l'autorité publique, des mandats de justice ou jugements, est qualifiée, selon les circonstances, crime ou délit de rébellion."

(emphasis added)

One may be certain, again, that the legislature's use of the word *"pour"* rather than *"dans"* was quite deliberate, and not the result of oversight or casual drafting. And what a fresh, straightforward reading of the text tells us is that they wished to protect, by virtue of this provision, not only those acts which in both substance and form, and in every sense were legal and regular, but also those which, though irregular, could reasonably be interpreted as having been performed with a view to exercising some right or duty which *prima facie* lay within the scope of police powers; *"Autrement dit, il est possible qu'un agent agisse, d'une manière illégale, mais en vue de l'exécution d'une loi ou d'un ordre de l'autorité."* 154

This view recognises the realities of daily policing, according the protection of the law where the policeman stays at least with one foot somewhere within the sphere of his attributions. Undoubtedly it is more in accord with the original intention of the legislators of last century, and, with respect, it is precisely this more flexible attitude which has, for quite different reasons and with quite different results, been sadly lacking in English law too. The present writer cannot but regret the approach of

English law as expressed in, *inter alia*, decisions such as *R v Yvonne Jones*, ¹⁵⁵ *Kenlin v Gardiner*, ¹⁵⁶ and *Pedro v Dias*. ¹⁵⁷ An unlawful touching, an unlawful seizure, indeed an unlawful detention as such, do not, it is submitted, constitute behaviour sufficiently reprehensible or onerous in its consequences for the individual to justify resistance; and the policemen involved in the above cases - if one examines the facts - were not, on a reasonable interpretation of these terms, guilty of what one might call an abuse of their functions. As one court in France neatly put it:

"Attendu que le seul fait qui importe c'est que l'officier ait agi dans l'exercice de ses fonctions et, s'il a agi irrégulièrement, qu'il l'ait fait en restant dans le cadre de ses attributions." ¹⁵⁸

(Emphasis added)

The writer cannot hope to surpass in simplicity and clarity this statement of the law as it ideally ought to be. One would confidently suggest that in each of the above cases the officers satisfied this test, and it is submitted that such an approach would be preferable to the present attitude of English law.

The common law on this side of the Channel suffers, then, from an undue insistence on the virtual sanctity (in this sphere) of the principle of absolute legality. However, in one sense, one may well understand this attitude, not only through an appreciation of the historical forces lying at its roots, but also given the constraints which the law has fashioned for itself, and from which it now has much difficulty in extricating itself (assuming of course that the motivation for change is there at all). We are, of course, speaking of the statutory form which the offences relevant to this sphere of private defence often take, such as section 51(1) of the Police Act (1964), which speaks of "a constable acting in the execution of his duty" (emphasis added). Given such phraseology, and its statutory authority, one may recognise the dilemma of the courts.

Take for example the case of *Donnelly v Jackman*, discussed earlier in this chapter. ¹⁵⁹ There, the court circumvented the difficulty by determining that in that case the police officer had not exceeded his powers

in touching the accused as he had; as we heard, "it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties". Now, while the conclusion reached in the case may be desirable (resistance unlawful), one may perhaps question the reasoning which led the Divisional Court to this result. For the charge laid referred precisely to a constable acting "in the execution of his duty" (emphasis added). In view of this, and of the rule of strict interpretation, one might reasonably conclude that while he may well have been acting with a view to the performance of his duties, the constable in question was nonetheless still acting unlawfully, strictly speaking. The^e wide scope of Article 209 of the *Code pénal* has no equivalent in English law, yet the Court in Donnelly v Jackman seems to have attempted somewhat to import into the latter the terms of this provision - "in the course of his duties" may be an ideal formulation, but it is not what the statute says.

In essence, the problem is that harmonising the law in England and France is difficult, since not only do they presently reach different conclusions on the question of resistance, but their points of departure are quite distinct, given the difference in texts. In the writer's opinion, therefore, the introduction which he proposes into the law on this side of the Channel of the concept of *rébellion*, as expressed by the *Code pénal* (on the fresh interpretation outlined above of Article 209) could only be done by legislative enactment and not by the courts. It should be noted, furthermore, that with this revised interpretation of *rébellion*, it is not so much a presumption, however strong or weak, which imposes itself; rather, it is simply an example of the positive law curtailing within reasonable limits tailored to the special situation, the normal right of private defence which would otherwise apply to any unlawful act. And the fact that one recognises that the act is still unlawful, permits the individual to seek a remedy in the civil courts, or to follow other administrative procedures which may be available, by way of reparation. This, it is submitted, is preferable to the present reliance of some courts (such as that in Donnelly v Jackman) on a legal fiction of dubious legitimacy.

7. The Parameters of Resistance (2)

Having identified the basis on which we place the law relating to resistance to the police, we may return to our examination of the suggestions put forward in French doctrine for the triggering of this right. For, subject to the reservations on their scope, outlined above, the one common theme which runs through them is the simple, straightforward principle that the point at which resistance becomes permitted, and the offence of *rébellion* disappears, is when the acts of the policeman are not merely unlawful but are characterised by such gravity as clearly to take the officer (or equivalent official) wholly outwith what one might term the 'sphere of his functions'. Indeed, we might say that resistance is only - but nevertheless willingly - admitted, where the acts performed are so serious as to constitute a clear abuse of his powers and functions - where he is, as it were, acting in every respect *ex proprio motu*, and where any supposed association between the acts performed and any alleged authority for them is of but the most tenuous kind. Thus, the writer would argue that measured resistance is justified where the acts are so serious that the official himself can be in no doubt as their lack of all authority.

As stated earlier, the writer would not limit justified resistance in such cases to instances involving violence against the person by the officer; what counts is not the object of the 'attack' but simply its nature, its gravity. Undoubtedly, personal violence is the clearest and most common example of such unlawful behaviour, but it is not the only one. Thus one would rightly consider the citizen to be justified in his (or her) resistance where, for example, there was a serious attack on his property, a wholly arbitrary arrest, a malicious imprisonment or illegal entry or some similar behaviour. There seems no reason for restricting in this way the right of resistance, the moment one recognises that forms of abuse other than personal violence may likewise represent serious infringements of liberties. In such cases, therefore, not only is there the possibility of civil reparation and the hope of effective disciplinary sanctions against the public official, but the criminal law too recognises the urgency of the situation and the disturbance to the legal order presented or threatened by the abuse; and so permits the reserve right of private defence to swing into

action, for the restriction of the positive law will not reach to protect acts which constitute serious violations of a citizen's rights.

Admittedly, this notion of gravity is not the easiest one to apply in law. The above theories each outline some indicators which would assist in determining whether this criterion had been satisfied, but the point here is that they cannot cover all eventualities. These would undoubtedly have to be worked out on a case by case basis; but one might expect that ultimately the courts would come to a 'core' of illegalities, which would, as a matter of law, give rise to a measured right of private defence, leaving the remainder for the appreciation of the triers of fact, where appropriate.

A lead in this direction has in fact been shown by some isolated decisions of the lower courts in France, although as yet, the *Cour de cassation* remains unmoved by these stirrings. The most renowned example is the decision of the Tribunal correctionnel de Bergerac 12 février 1953,¹⁵⁰ which acquitted a man who had resisted a bailiff attempting to evict him - when no eviction order had been given; when the applicant had in any case no longer any right over the property in question; and where furthermore, the bailiff was quite aware of these facts. The seriousness of the abuse could not be doubted here, and it seems only reasonable that the accused should have been held justified in acting as he did. Here, he had assaulted the bailiff and his resistance was upheld by the trial court. However, in a different case another court, while taking the view that serious abuse did justify defensive action by the individual, stressed that this would only be permitted if it took the form of passive resistance.¹⁵¹ But this immediately raises several objections.

Firstly, in order to have the offence of *rébellion* made out, the resistance must involve some active use of force (even though this is now construed rather widely by the courts)¹⁵² since the latter is a constituent part of the offence. Passive resistance does not constitute *rébellion*, and so the decision represents little progress in the law, for the *Cour de cassation* itself has often pointed out this need for active opposition to the forces of order.¹⁵³

In any case, a further criticism one may level is that, as Cattani observes, merely to allow passive resistance amounts virtually to permitting no resistance at all. ¹⁶⁴ The court in the present case may be criticised for failing to realise that there are occasions where passive resistance will be totally ineffective, and where the situation calls for active *intervention* by the private citizen.

And finally, this view is to be rejected for its subordination of the individual's rights and interests to those of the police to such a considerable degree, when what is at issue is, as affirmed by the court itself in the above case, a serious abuse of official powers. Such an approach represents a heavy-handed and unreasonable use of the proportionality rule which cannot readily be justified. The writer therefore stresses that so long as this criterion of gravity is made out, then physical force may, where necessary, be justifiable, and in consequence thoroughly approves the decision of the *Tribunal correctionnel de Bergerac*. ¹⁶⁵

It goes without saying, though, that the violence use^d would have to conform to the twin requirements of necessity and proportion. And where these were not made out, the individual would fall once more within the scope of the criminal law. However, he could not, it is submitted, be convicted of *r bellion*, since the officer's total want of authority is by definition established; instead, conviction would properly follow on an assault charge, or where appropriate, a charge of criminal homicide.

This notion of gravity is, as stated earlier, the real essence of many proposals permitting resistance in certain cases, and it appears under various guises, such as "irreparability"¹⁶⁶ or "intolerability". ¹⁶⁷ And as a basic criterion for the justification of resistance to the authorities it accords with the sentiments of many continental lawyers that the peculiar nature of this police-citizen confrontation demands a modification of the normal principles of private defence.

However, a considerable number of authors have pointed to a second criterion which must be satisfied before forcible opposition becomes permissible. Hence, one finds frequent reference to the requirement that the

abuse be not only serious but also "manifest".¹⁶⁶ Now, clearly the 'manifest' nature of the abuse will be evidence of the gravity of the unlawful action performed by the public official (for example, where a policeman 'roughs up' a prisoner) - but the two do not always go hand in hand.¹⁶⁷ And so it is not clear why this criterion should be set. Indeed its application is surely cause for concern. While the writer would not as such feel resistance justifiable merely because of the obvious nature of the illegality (it may on occasions be manifest, but not serious), he would contest even more vigorously the contention that the latter is a necessary component of the right of resistance.

The problem appears to be that the advocates of this solution are endeavouring to make the offence of *r bellion* one of strict liability in relation to the contested legality of the official's act. It is, in the circumstances, a necessary restriction of the normal rules of private defence, dictated by important policy considerations, given the circumstances in which the majority police-public encounters take place.¹⁷⁰ If so, then at best the phrasing is merely rather unfortunate and ambiguous. At worst, however, if taken literally the formulation is objectionable in that it is both unjust and unnecessary. It is unjust, because such a view in fact imposes something much more than strict liability. For the logical consequence is that even where one faced a serious violation of one's rights, if this illegality was not immediately obvious, but in fact was known to the resisting individual (for whatever reason) then resistance would nonetheless be unlawful. Such a rule is surely as illogical as it is inequitable. It may be true that the law sometimes punishes the obtuse, but where the individual displays a legal acuity, or benefits from privileged information denied his peers, then the law should not penalise him for having, by inordinate wit or good fortune, identified a serious violation of the legal order, committed by one of its most vital agents, and having acted in defence of that order.¹⁷¹

But in any case it is also unnecessary. For, in order to impose strict liability one need merely lay down that where, at trial, it is shown that the arrest (for example) was, though irregular, still largely within the sphere of the policeman's attributions, or a *fortiori*, entirely legal in both substance and form, then any belief, 'reasonable' or otherwise, on the part of the accused that the action was in fact unlawful is irrelevant to the

question of culpability. ¹⁷² If the question of 'flagrancy' is used merely as a substitute for the 'seriousness' of the violation (where the latter is made out), or if it is considered a useful *indicator* to the private individual to help him decide whether he should resist or not, then the term has some use. But to incorporate this as a *condition* of resistance is surely quite inadmissible and constitutes an unwelcome and unjustifiable addition to the significant restrictions already imposed within this context upon the traditional right of private defence. While there are signs that some writers do intend by the notion to mean simply that no reasonable belief can exculpate if the act was legal, until such doctrine becomes clearer on the matter, such dual divisions of the criteria for resistance must, it is submitted, be treated with caution.

Conclusion

Some concluding points on the subject of resistance to authority are necessary. In putting the case for the revision of the present judicial interpretation of Article 209 of the *Code pénal* and for the introduction of the concept of *rébellion* into English (and Scots) law, the writer has attempted to demonstrate that given the special circumstances surrounding resistance to illegal acts committed by those in authority; and given the particular undesirability of confrontations between private citizens and the police, considerations of proportionality demand some modification of the principles of private defence which would otherwise apply were the conflict purely between private individuals.

The case has been argued here for a restriction of the right to only those instances which involve a *serious* violation of the citizen's rights, whether this fact is on the face evident or not, and further that *rébellion* should be an offence of strict liability in relation to the citizen's belief as to the illegality of the act in question. The writer has sought to differ from some proposals which, it is submitted, set the right within too rigid a framework, instead preferring the view that once gravity is made out, this notion is applicable to various spheres of 'official' action, not merely the infliction of violence against the person. The submission here is that where

the officer is not by his actions seen to have taken himself, on any reasonable view, clearly outwith the sphere of his functions, then any resistance is unlawful, and would constitute an aggravated form of assault. This view is taken as being largely justified on policy grounds, and represents, it is submitted, a reasonably necessary restriction imposed by positive law upon the natural law principles of private defence - the underlying premise being that on balance, it is preferable for the individual to suffer, on the moment, the injustice rather than engage in confrontation with officers of the law. It is in such situations that the reasoning advanced regularly by the *Cour de cassation* becomes somewhat more compelling and more appropriate to the circumstances.

However, the aim is not to cast a total protection around officers of the law - rather it is seen as the most appropriate response to the conditions obtaining where a policeman acts illegally but does not commit a serious violation of the citizen's rights. He cannot expect to enjoy total immunity; and the citizen has open to him, even where resistance is prohibited, the power of seeking redress in the civil courts. Equally, there are internal administrative and disciplinary procedures open, whereby sanctions may be imposed upon officers who have been guilty of departing from recognised official procedures, particularly when these 'recognised procedures' derive from the common law rules relating to trespass and assault.

But let us be quite clear on this matter. The proposals outlined in this chapter are admittedly controversial. This area of the law does not admit of easy resolution; and the arguments forwarded here will find little favour in many, indeed probably most, quarters - about this the writer harbours no illusions. The ultimate burden - a heavy one - falls on the individual citizen. If, then, civil society is truly based upon a two-way system of respect and trust a particular responsibility rests upon those in authority; that responsibility is to see that, irrespective of any power of resistance a citizen may have, then in return for the price the public, as a collection of individuals, pays, it may be assured that proper, proportioned and effective sanctions are, where necessary, instituted and applied against those officers, particularly police officers, who to a greater or lesser

degree abuse the powers vested in them as privileged custodians of that public's peace.

APPENDIX

1. Merle et Vitu, *supra*, Vol.1, 514; see Kenlin & Another v Gardiner & Another (1966) 3 All ER 931, per Winn, LJ at 933I.
2. *Supra*, introduction.
3. This term is taken here to cover not only police officers but also, for example, bailiffs and other people who hold similar 'coercive' powers over the private individual, in the name of the law.
4. "... with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily." Stephen, *History of the Criminal Law*, Vol. 1, 494, cited in Christie v Leachinsky (1947) 1 All ER 567, per Lord Du Parc at 580.
5. See for example Yong's Case (1584) Co.Rep. 40a. It was held that the killing of a constable or any of his assistants, where they had intervened to suppress an affray, was murder, even where the accused did not know the victim's true identity. Thus, it would appear that a killing in such circumstances was an offence of strict liability, and any plea such as provocation which might have availed the accused had the victim been an ordinary member of the public, could not be successfully invoked.
6. See *Russell on Crime*, *supra*, 447; *Kenny's Outlines*, *supra*, 145.
7. (1634) Cro.Car.371.
8. C.f. *Russell on Crime*, *supra*, 447.
9. See eg Chevigny, P.G., *The Right to Resist an Unlawful Arrest* (1969) 78 Yale Law Journal 1128.
10. (1825) 1 Mood 79.
11. (1854) Dears 357.
12. For broadly similar facts, see the decision one year later in R v Curvan (1926) 1 Mood 131.
13. E.g. R v Thompson (1825) 1 Mood 79.
14. R v Tooley 2 Ld. Raym. 1296, 1301-2. Also Hugget's Case (1666) Kel (J) 59, R v Thompson, *supra*, R v Curvan (1826) 1 Mood 131; c.f. R v Warner & Others (1833) 1 Mood 380. In R v Osmer (1804) 5 East 304, Lord Ellenborough, C.J. referred to illegal arrest as constituting a breach of the peace, against which necessary force might be used in its prevention.
15. Id.
16. Id. See *Russell on Crime*, *supra*, 447-8.
17. R v Thompson (1825) 1 Mood 79; c.f. The People v White (1947) IR 247; in contrast, see R v Patience (1837) 7 Car & P 775.

18. B.g. Hume, *Commentaries*, supra, Vol 1, 250: "Very suitable such a decision may be to the rest of the English practice, in which it is held that a pull by the nose, or a fillip on the forehead ... is a sufficient provocation to extenuate the guilt of homicide. But as suitable as such a rule is to their practice, as unsuitable it would be to ours, which is quite a stranger to any plea of extenuation grounded on such trivial offences, and requires a proof of bodily distress and agitation of spirits in the case of an assault by any ordinary man, and much more will require it in the case of an officer of the law; who may indeed fall into an error, but has commonly some excuse, and an opinion of duty, less or more, for what he does." C.f. John & Arthur O'Neal, January 5th and February 1st, 2nd & 4th, 1796, cited pp251-2. It will be appreciated then that this attitude prevailed in Scotland against the backdrop of an already restrictive notion of provocation as between ordinary citizens.
19. Hume, 1, 251. Although he is not entirely clear on the matter, Hume does appear to allow a plea in justification of homicide, where, upon being resisted, the officer offered such violence as to imperil the life of the accused, who consequently slew him. He is careful, though, to stress that he had to "*observe the moderamen inculpatae tutelae* in his defence", and one might well assume that the courts in such cases scrutinised with particular minuteness the measure of the defence.
20. The plea of 'excessive defence', revived notably by the Australian courts, and for which there is some early English authority. See, *infra*, Chapter 6.
21. For example, a homicidal attack, or one of a potentially lethal character. It must be pointed out that it is a forgivable, but nonetheless fundamental error to assume that a homicidal attack will perforce justify a homicidal response. This is not so. It makes out a *prima facie* case of justification since proportion is satisfied, but acquittal is subject to the second major criterion of the right of self-defence, that of necessity, being satisfied. This is crucial to an understanding of both private defence and the qualified plea of excessive defence. In the particular instance of illegal arrest *tout court*, then one may say that the aggression fails to satisfy the Minimum Threshold of Attack - see *infra*, Chapter 6.
22. It is, within this context, difficult to know what to make of Cook's Case Cro. Car.537, which presents some major analytical difficulties, and is hard to categorise precisely into any one branch of the law. The accused was indicted for the murder of a bailiff who, with several others, had attempted early one morning to break into his house to serve process. According to the report, the Court unanimously held that the offence was not one of murder, but of manslaughter only, due to the fact that the bailiff was engaged in an unlawful act, in seeking forcible entry. This, and the surrounding text, strongly suggest - though it is not expressly declared - that once more, the illegality of the act constituted sufficient provocation to reduce the killing to manslaughter, but that nevertheless such killing would never be justifiable (due to disproportion in law), and would otherwise be murder. However, we are told later that "*Yet they all held, that it was manslaughter: for he might have resisted him without killing him...*". Now this is quite another matter altogether, for the clear inference one

may draw is that had it been necessary to kill in order to resist effectively the unlawful actions of the bailiffs, then the accused would have been justified in doing so. Here, the manslaughter verdict is clearly derived from a plea of excessive defence (this is precisely the interpretation put upon it by Lowe, J in *R v McKay* (1957) VR 560, 563.

23. *R v Walker* (1854) Dears. 357.
24. *R v Thompson, supra*; *R v Patience* (1837) 7 Car & P 775.
25. *R v Curvan* (1826) 1 Mood 131.
26. E.g. *R v Curvan* (1826) 1 Mood 131; *R v Patience, supra*. Indeed, in some cases it is not clear that there was any physical contact between the accused and his victim at the critical moment - see *R v Thompson, supra*, and *R v Tooley* 2 Ld.Raym. 1296. In *Tooley*, furthermore, there was it seems a considerable 'cooling-off' period between the first altercation and the subsequent killing.
27. E.g. *Ferrer's Case* (1634) Cro.Car. 371; *R v Tooley, supra*. C.f. *Hugget's Case* (1666) Kel (J) 59, *MacKalley's Case* (1611) 9 Co.Rep. 615; *Rv Allen* (1867) 17 LT 222.
28. See *Ferrer's Case, supra*; apparently also *R v Tooley, supra*. Also, *Hugget's Case, supra*.
29. see *Tooley, supra* at 1301.
30. A comment which surely has become even more pertinent with the mass and complexity of statutory authority in this area of the law. For a vivid example of the confusion and difficulties which may arise, compare the judgements of the Divisional Court and the House of Lords in *Albert v Lavin* (1981) 1 All ER 628 and (1981) 3 All ER 878 respectively.
31. See eg *R v Dadson* (1850) 2 Den. 35. Hume was certainly not favourably disposed to such an argument, at least in this particular situation: *Commentaries*, I, 251, referring to the case of *J & A O'Neal, supra*, and the conviction of the former on a charge of murder. Incidentally, he tells us that "somewhat unexpectedly, this ruffian received a pardon...".
32. Quoted, *Russell on Crime*, p449. Hume was, as we have seen, highly critical of the English position: "... and yet according to the supposed doctrine of the law of England, he may be killed with impunity by a ruffian, equally ignorant of that defect as the officer, and who is actuated at the time by mere brutal age or malignity of heart." *Commentaries*, I, *supra*, 251. It will be noticed that Hume does, though, take an even more extreme interpretation of the law than presented here, and one may doubt somewhat the accuracy of his statement, speaking as he does, in 1844, of justification, presumably.
33. *Supra*.
34. Which most often has been the case. Hume was particularly aware of this factor: *Commentaries*, I, *supra*, 251: "On the whole there seems to

be the highest equity and reason for considering the difficult situation of an officer of the law, who may often be necessarily ignorant of the defect of his warrant."

35. *R v Patience*, *supra*; c.p. *R v Thompson*, *supra*.
36. *R v Warner & Others* (1833) 1 Mood 379 (interference by a gamekeeper with persons found armed in the pursuit of game, on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter). Compare *R v Tooley*, *supra*; there, the killing occurred "before any stroke received", we are told by the case report.
37. *R v Davis* (1861) L & C 64. The case involved a conviction, affirmed on appeal, for assault upon a bailiff. In denying the right of resistance at all, the decision arguably goes well beyond the previous law, and may indeed be seen as extreme even by modern standards. C.f. Chevigny, P., *The Right to Resist an Unlawful Arrest* (1969) 78 Yale Law Journal 1128, 1131; for French cases in point, see *infra*.
38. *R v Allen* (1867) 17 LT 222, cited *Russell on Crime*, *supra*, 450. Both this case and that of *R v Davis*, *supra*, were not without some precedent - see *R v Ford* (1817) Russ. & Ry. C.C.R. 329. The accused was taken into custody on a charge of having in his possession a forged banknote. While being handcuffed, he shot the officer in the face, and during a subsequent struggle inflicted several blows to his head with the pistol. He was convicted on various wounding charges, and on appeal it was held that though the charge was actually defective, this was irrelevant, and the conviction was affirmed. For an even earlier authority, see *MacKalley's Case* (1611) 9 Co.Rep. 615.
39. *R v Warner* (1833) 1 Mood 380, per Alderson, J at 385; *R v Davis* (1861) L & C 64, per Pollock, CB at 71; c.f. *Russell on Crime*, *supra*, 450. The caselaw of the time was not however all one way - see *R v Lockley & Ors.* (1844) 4 F & F 155.
40. *Russell on Crime*, *supra*, 452-3. C.f. *R v Cobbett* (1940-42) 28 CAR 11. The appellant, writing innocently on a scrap of paper near a gun emplacement, was questioned by a wartime reserve constable. A struggle followed, during which the constable truncheoned the appellant, who then stabbed him. His conviction for murder was substituted on appeal by one of manslaughter, as the trial judge had not left open to the jury the question of provocation. It is not, however, clear from the report the relationship between the deceased's use of violence and any official capacity in which he may or may not have been acting at the crucial moment. See also *People v White* (1947) IR 247. White shot dead a Garda who had, without a warrant, come to arrest him, on suspicion of belonging to an illegal organisation. His conviction for murder was set aside on appeal, for "it was manslaughter, not murder, since there was no lawful authority for the intended arrest ... even if White was forearmed ..." But we are not told why, or how it reduces to manslaughter. Provocation? A form of excessive self-defence? The mere fact that the arrest was illegal, the reduction acting as a form of punishment/lesson to the police? As in *Tooley*, *supra*, one cannot help but feel that White benefited from a technicality of which he was, further, unaware at the time. One may be forgiven for suspecting that,

as far as he was concerned, he was shooting at police officers in order to make good his escape - no more, no less.

41. *Supra*, at p145; c.f. Williams, Gl., *Requisites of a Valid Arrest* (1964) Crim. L.R. 6, 11.
42. The writer would not, of course, deny the individual the right of a plea in justification where he killed or maimed an arrestor who at the very outset, and with no reasonable cause, launched into using deadly force against his arrestee. This would of course be none other than a homicidal assault against the individual in question. It is possible to take this to be the true meaning of the texts in *Russell on Crime*, *supra*, 452, *Kenny's Outlines*, *supra*, 145 and Williams, Gl. (1964) Crim. L.R. 6, 11, but this is not certain, given their failure to specify the precise character and moment of the violence of the arrestor.
43. Police Act, 1964, section 51(1), replacing earlier legislation.
44. (1966) 3 All ER 931, (1967) Crim.L.R. 39.
45. "Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence ...".
46. Cf. *Ludlow & Ors. v Burgess* (1982) 75 CAR 227, (1971) Crim.L.R. 238, the court finding such action (detention without arrest) to be a serious interference with individual liberty.
47. See *supra*, Chapter 1.
48. E.g. *Chan Kau v R* (1955) AC 205; *R v Lobell* (1957) 1 All ER 734; *R v Wheeler* (1967) 1 WLR 1531; *R v Julien* (1969) 2 All ER 856; *R v Araham* (1973) 3 All ER 694; *R v Folley* (1978) Crim.L.R. 556; *Bharat v R* (1959) Crim.L.R. 786.
49. (1978) 3 All ER 1098; (1978) Crim.L.R. 684.
50. See per Pain, J at 1102.
51. E.g. *Kenlin & Anr. v Gardiner & Anr.* (1966) 3 All ER 931; *Ludlow & Ors. v Burgess* (1982) 75 CAR 227; *R v Jones (Yvonne)* (1978) 3 All ER 1098; *King v Gardner* (1980) 71 CAR 13; *Coffin & Anr. v Smith & Anr.* (1980) 71 CAR 221; *Bentley v Brudzinski* (1982) 75 CAR 217; *McLorie v Oxford* (1982) 75 CAR 137; *Brazil v Chief Constable of Surrey* (1983) 77 CAR 237.
52. (1982) 75 CAR 227, (1971) Crim.L.R. 238.
53. It is worth pointing out that in several of the cases examined in this chapter the appeals were successful since the statutory offence (assault upon an acting police officer) had not been made out. But it seems implicit in many cases that the court considered the action to have been justified.
54. (1979) Crim.L.R. 309.

55. C.f. Twycross v Farrell (1973) SLT (n) 84; R v Jones (Yvonne) (1978) 3 All ER 1098, (1978) Crim.L.R. 684; Pedro v Dias (1981) 2 All ER 59; Kenlin & Anr. v Gardiner & Anr. (1966) 3 All ER 931, (1967) Crim.L.R. 39.
 56. E.g. Ludlow & Ors. v Burgess, *supra*; Bentley v Brudzinski, *supra*.
 57. E.g. Ludlow & Ors v Burgess (1979) Crim.L.R. 309; Pedro v Dias (1981) 2 All ER 59; c.p. Donnelly v Jackman (1970) 2 WLR 562.
 58. See for example R v Wilson (1955) 1 WLR 493; also Lindley v Rutter Times 1 August 1980, R v Mabel (1840) 9 Car & P 475; McArdle v Wallace (1964) Crim.L.R. 467, 468; Kenlin v Gardiner, *supra*, (comment) at 40. The possible suggestion from the comment to this last case that had the policemen in fact been mere private individuals then the accused would not have been held to the same standard of reasonableness is, it is submitted, erroneous.
- The charge frequently laid is under section 51(1) of the Police Act 1964 (as amended), and is particularly popular in its preclusion of the right of jury trial for the accused. It is to avoid this possibility that the authorities in England have frequently been reluctant to conjoin it with a charge of common assault. See Williams, *Textbook*, *supra*, 199-200.
59. Cf. Davis v Lisle (1936) 2 KB 434, per Hewart, CJ at 437.
 60. (1936) 2 KB 434.
 61. Metropolitan Police Act 1839, section 18; Prevention of Crimes Amendment Act 1885, section 2.
 62. The Court was though most careful to point out that it was not deciding whether the particular action by the appellant had been justified. There was in this case, furthermore, an additional charge of common assault. It would, though, be wrong to interpret the words of Hewart, CJ to this effect, as implying that he doubted the existence of the right of physical resistance or removal as such; rather, he seems to have been unwilling to pass judgement on the amount of force used in the particular circumstances.
 63. Davis v Lisle, *supra*, per Goddard, J at 440; and Lord Hewart, CJ at 437: "It is one thing to say that the officers were at liberty to enter the garage to make an inquiry, but quite a different thing to say that they were entitled to remain when, not without emphasis, the appellant had said: 'Get outside. You cannot come here without a search warrant.'"; also Robson and Another v Hallett (1967) 2 QB 939, per Diplock, LJ at 953-4; per L. Parker, CJ at 950-1. Presumably, though, this would not extend to entry into a dwelling-house irrespective of whether the officer has, *prima facie*, business with the owner, for such action generally requires express permission - McArdle v Wallace (1964) Crim.L.R. 467 (comment) at 468.
 64. Davis v Lisle, *supra*. Note that this implied licence may in fact be revoked *ab initio*, making instant trespassers of those subject to the revocation. It therefore seems that one can expressly refuse all entry

(again, in the absence of say, the countervailing authority of a warrant) to police officers, by putting up a sign to this effect; see Robson & Anr. v Hallett (1967) 2 QB 939, per Diplock, LJ at 954.

65. Robson & Anr. v Hallett, *supra*, per L. Parker, CJ at 952-3; Diplock, LJ at 954.
66. R v Thornley (1981) 72 CAR 302. The right of revocation is, as it were, suspended until the police have completed their lawful business. But once this has been done, then were the officers to attempt to remain, the right of revocation (and potentially, resistance) would presumably be revived.
67. Robson & Anr. v Hallett, *supra*, especially per Diplock, LJ at 954-5.
68. Vershof v Commissioner of Police for the Metropolis (1978) 3 All ER 540, per May, J at 551. C.f. Chammas, S., *La Légitime Défense*, (thesis), *supra*, 216: "*Chacun doit supporter son erreur et même l'application de cet adage devra être plus stricte quand il s'agit du fonctionnaire chargé de la mission de veiller à la sauvegarde de des (sic.) droits.*" Also Guillemon, P, *De la Rébellion et de la Résistance aux Actes Illégaux*, thesis, (Bordeaux 1921) 68: "... si quelqu'un est censé ne pas ignorer la loi, c'est bien le fonctionnaire qui est chargé d'en assurer l'application..."
69. Cf. Vershof, *supra*, per May, J at 551. The question of reasonableness would, though, be relevant were the officers subsequently to be the subject of a civil action for, say, malicious imprisonment. See also King v Gardner (1980) 71 CAR 13.
70. See Williams, *Textbook*, *supra*, 177.
71. (1966) 3 All ER 931; (1967) Crim.L.R. 39.
72. Which amounts really to saying that they do not have the power to act that way anyway.
73. (1978) 3 All ER 1098; (1978) Crim.L.R. 684.
74. See Williams, *Textbook*, *supra*, 513.
75. See Pedro v Diss (1981) 2 All ER 59; Rv Inwood (1973) 2 All ER 645, especially per Stephenson, LJ at 649 - "*There is no magic formula; only the obligation to make it plain to the suspect by what is said and done that he is no longer a free man.*"

But again, in Pedro v Dias and similar cases, the court held that there was no assault within the meaning of section 51(1) of the Police Act 1964; they do not as such decide upon the question of whether the appellants were guilty or not of common assault. The appellant in Inwood may well have been "a man of good character who had never before been asked to go to a police station to help the police with their enquiries", but on the facts, the very serious nature of the violence employed surely indicates, that an assault had been committed c.f. R v Wilson (1955) 1 WLR 493.

That effective communication to the arrestee is a necessary component of a lawful arrest was also stressed by the Divisional Court in Alderson v Booth (1969) 53 CAR 301. There, another consequence flowing from the illegal actions of police officers was demonstrated: the Court upheld Quarter Sessions which had dismissed the original charge (a driving offence), as the accused had not in law "been arrested".

76. *Requisites of a Valid Arrest* (1954) Crim. L.R. 6, 10.

77. For an indication of the complexity and potential for confusion, compare the approaches of the Divisional Court and the House of Lords, in Albert v Lavin (1981) 1 All ER 628 and (1981) 3 All ER 878 respectively.

78. Williams, *Textbook*, *supra*, 513.

79. The leading case is Christie v Leachinsky (1947) AC 573. See also generally, Williams, G, (1954) Crim.L.R. 6 and *Textbook*, *supra*, Chapter 22. The requirement admits of only limited exceptions; see Leachinsky, *supra*, per Viscount Simon at 572-3; c.f. Gelberg v Miller (1961) 1 WLR 153; and cp. R v McKenzie & Davis (1979) Crim.L.R. 164, which would appear to be wrongly decided. See the brief but valuable commentary to the case by Professor J.C. Smith at 166.

It is not however necessary that the grounds given be the exact same as the actual charge subsequently laid (how can a policeman tell whether he is dealing with a case of manslaughter rather than murder?), but the substance of what it is in his behaviour that has prompted the arrest must be communicated to him.

80. Christie v Leachinsky, *supra*, per Viscount Simon, LC at 588; Williams, (1954) Crim.L.R. 6, 17. Lord Du Parcq however suggested in Leachinsky that the true rationale is that if he is not told of the reason for his arrest, the individual does not have the relevant information at his disposal in order to decide whether he should (may) resist what could be an illegal arrest. See also Brazil v Chief Constable of Surrey (1983) 77 CAR 237, pr Goff, LJ at 244.

81. R v Osmer (1804) 5 East 304, per Lord Ellenborough, CJ at 308; Kenlin v Gardiner, *supra*. Nevertheless, the case still presents us with some problems. It appears from the report that the justices at first instance found that the appellants had believed the police officers to be thugs (see per Winn, LJ at 932). Given this, there seems to be no reason why they convicted. Hence the successful appeal could presumably have proceeded on two grounds, one of justification (self-defence against technical assault) and one of excuse (reasonable

error of fact). This surely follows from the normal principles of *mens rea* - unless of course, the justices found that their belief had been unreasonable. But this is by no means obvious from the facts. The standard of reasonableness in the belief is also mentioned in *R v Fennell* (1970) 3 All ER 215.

82. Williams, *Textbook*, *supra*, 513.

83. A good example of the application of this principle is to be found in *R v Fennell* (1970) 3 All ER 215, where it was stated that a father's reasonable belief that his son was being unlawfully detained was no defence to a charge of statutory assault upon a police officer. At his trial, the Deputy-Recorder ruled that this could not in law amount to a defence, but on appeal, the Court distinguished for the purposes of (A) a defence of reasonable belief, between (B) injury and (C) detention, allowing it only in the case of apprehended injury. Professor Williams gives a trenchant criticism of this judgement (*Textbook*, 514-5), but with respect, it is not clear that (in addition to the undoubted link between A and B), the alleged relationship between A and C, which Williams accused the Court of Appeal of having fractured, ever existed. The question of whether a person has been illegally arrested is, though containing issues of fact, surely ultimately one of law. An error as to this is consequently irrelevant, whether it be a case of third-party rescue or straightforward personal resistance. On the other hand, the question of whether one's son (or, of course, oneself) is in danger of unlawful injury at the hands of the police is one of fact - given this, there is no reason not to apply the normal principles of *mens rea* in relation to reasonable error.

One should note that the Court left untouched the principle that in cases where the arrest or detention did in fact prove unlawful, then resistance, or reasonable force was justified. And so Professor Williams's apparent implication (p514) that the case decided otherwise is, it is submitted, incorrect; as Lord Justice Widgery rightly declared (1970) 3 All ER 215, 217: "... father who forcibly releases the child does so at his peril." The exact meaning of Williams's comments on this point is not entirely clear; but even if the correct interpretation of them is that he implies that the Court would allow reasonable but erroneous belief as a defence where one secured one's own freedom from the *supposed* illegal detention, but not that of a third party, then this equally must surely be incorrect. There seems to be no reason for distinguishing between the two. The case therefore, in the present writer's opinion, does not constitute the assault upon normal legal principle which Professor Williams alleges it to be; and the writer finds little to fault in the reasoning of the Court of Appeal. In descriptive terms, one would therefore question the assertion that "*It is anomalous, therefore, to deny the operation of the usual mens rea principle in these circumstances.*"

84. (1981) 3 All ER 878

85. Their Lordships pointed out that, in the circumstances, the Divisional Court's lengthy consideration of principles of *mens rea*, reasonableness, objective and subjective tests on the lines of the debate surrounding *Morgan v D.P.P.* (1976) AC 182 had thus been quite unnecessary, and could have been avoided had it been realised by the lower court that

"to the well-established principle referred to by the learned judge there is an equally well-established exception, not confined to constables, that is applicable to the instant case. It is that every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation." - per Lord Diplock at 880. In fact their Lordships expressly refused to answer the question of law relating to unreasonable belief, holding such a venture to be improper in the circumstances.

Furthermore, given their decision, their Lordships would presumably have found justified a prosecution relating to the first blows delivered by the appellant, before the respondent declared himself to be a policeman. These blows were not the subject of the prosecution, a decision which appears to have been assumed to be correct by the Divisional Court; see (1981) 1 All ER 628, per Hodgson, J at 632.

86. Equally, though, the accused may have plenty of time to ponder his situation, and the legal implications thereof; see Alan Gordon Barrett & John Graham Barrett (1981) 72 CAR 212. Here the court admitted of the principle of honest and reasonable mistake about one's legal rights, but declared this to be inapplicable where the rights in question have been the subject of litigation and the courts have stated what those rights are, but the losing party refuses to accept this (in the present case, no fewer than eight different court orders concerning ownership and possession of a house). The court was in effect stating that the appellants' beliefs were, on the facts, unreasonable.
87. (1970) 1 WLR 562.
88. Id. at 565. C.p. Ludlow & Ors. v Burgess (1982) 75 CAR 227, (1971) Crim.L.R. 238; Hickman v O'Dwyer (1979) Crim.L.R. 309. The court in Donnelly v Jackman distinguished Davis v Lisle (1936) 2 KB 434 and Kenlin v Gardiner (1966) 3 All ER 931 as having involved more serious infringements upon individual liberty.
89. (1980) 3 WLR 660, Times 1 August 1980. See Williams, *Textbook*, *supra*, 512.
90. The case is a prime example of the confusion which still reigns in some circles between necessity and proportion. Sometimes the one term is used for both - see Criminal Code Bill Commission 1879, Report p.11. As Professor Williams points out, what the Court presumably meant in this case was that the force used was disproportionate to the harm the accused faced. However, see also the interesting remarks by Widgery, LJ in R v Fennell (1970) 3 All ER 215 at 217b-c. Compare R v Yvonne Jones (1978) 3 All ER 1098, (1978) Crim.L.R. 684, and Kenlin v Gardiner, *supra*.
91. E.g. Ludlow & Ors. v Burgess, *supra*; Brazil v Chief Constable of Surrey, *supra*.

92. Bentley v Brudzinski (1982) 75 CAR 217, per Donaldson, LJ at 226.
93. Not that this makes tyrannies of all administrations which are overthrown in this way; and even where this is the case, the question of whether the means employed were the only reasonable means available is, of course, quite another matter.
94. Chammas, S., *La Légitime Défense*, (thesis), *supra*, 199-200. Note though how one might quite easily radically alter the emphasis by changing the order of the two statements.
95. *Id.* at 216.
96. In an article by David Pead which appeared in the Police Review 10th April 1987, the total numbers of assaults producing injury against police officers, estimated by forces contacted in a survey, were given as follows: For Scotland: 1981-2297; 1982-2465; 1983-2463; 1984-2710; 1985-2607; 1986-1319. For England and Wales: 1981-9841; 1982-8616; 1983-8686; 1984-9172; 1985-10276; 1986-10111. The writer acknowledges the assistance of the Scottish Police Federation in obtaining these statistics.
97. Kenlin v Gardiner (1966) 3 All ER 931, Ludlow v Burgess (1982) 75 CAR 227, R v Inwood (1973) 2 All ER 645, R v Yvonne Jones (1978) 3 All ER 1098, Pedro v Diss (1981) 2 All ER 59.
98. The expression "storm in a teacup" is not infrequently on the lips of members of the judiciary - see R v Yvonne Jones, *supra*, per Pain, J at 1100; Kenlin v Gardiner, *supra*, per Winn, LJ at 932; c.f. Wershof v Commissioner of Police for the Metropolis (1978) 3 All ER 540, per May, J at 546. It does not take much imagination to picture the circumstances of the various confrontations in the case of R v Jones, which certainly render the whole circumstances and evolution of the scenario most regrettable.
99. *Textbook*, *supra*, 512.
100. See Ludlow & Ors. v Burgess (1982) 75 CAR 227.
101. The first case directly in point, and which unequivocally established the Cour de cassation's rejection of the principle of resistance seems to be Cr 18 avril 1820 S.1821.1.218 (Costeroste), although there is reason to suppose that the Court's jurisprudence became firmly established within two years of the enactment of the present *Code pénal*; see Cr 16 avril 1812 S.1812.1.77 (Clavié, Darré et autres). What is particularly remarkable, given especially that we are dealing here with France, is that in most of the academic writings on the matter there is very little modern authority cited, the Court's position being so fixed that virtually all major cases on this issue date from the early or mid-nineteenth century.
102. Cr. 14 avril 1820 S.1821.1.218 ; Cr. 5 janvier 1821 S.1821.1.358 ; Cr. 3 septembre 1824 B.C. no.110 ; Cr. 15 octobre 1824 B.C. no.40; Cr. 15 juillet 1826 B.C. no.140; Cr. 15 septembre 1864 B.C. no.231, S.1865.1.152, D.1865.1.200 ; Cr. 22 août 1867 S.1868.1.142; Cr. 29 février 1884 B.C. no.60; Cr. 28 novembre 1902 S.1904.1.57, note Chavegrin;

Cr. 11 août 1905 B.C. no.403 ; Cr. 27 août 1908 D.1909.79; Cr. 3 mai 1961 B.C. no.234; Cr. 9 février 1972 B.C. no.54; contra: Cr. 13 mars 1817 S.1817.1.296 (.....); Cr. 30 avril 1847 S.1847.1.627; Tribunal Correctionnel de Lille 12 février 1948 D.1948.350; Tribunal Correctionnel de Bergerac 12 février 1953 D.1953.S.60.

103. S.1821.1.358.
104. Cf. Cr. 14 avril 1820 S.1821.1.218 ; Cr. 29 février 1884 B.C. no.60 ; Cr. 11 août 1905 B.C. no.403 respectively.
105. See discussion *infra*.
106. See discussion *infra*.
107. See the strong resemblance between this text and that of the decision in Cr. 22 août 1867 S.1868.1.142 (Panien et Billot). Indeed, singly or together, these three main arguments in the Court's reasoning recur throughout the case reports.
108. See Le Sellyer's somewhat improbable suggestion that the legislature could not have foreseen the possibility of abuse by public officers; *Traité, supra*, p297.
109. *Code pénal de 1791, Article I, Pt.2, Tit.1, s.4: "Lorsqu'un ou plusieurs agents préposés soit à l'exécution d'une loi, soit à la perception d'une contribution légalement établie, soit à l'exécution d'un jugement, mandat, d'une ordonnance de justice ou de police; lorsque tout dépositaire quelconque de la force publique, agissant légalement dans l'ordre de ses fonctions, aura prononcé cette formule 'Obéissance à la loi'; - Quiconque opposera des violences et voies de fait, sera coupable de crime d'offense à la loi et sera puni de la peine de deux années de détention."* C.f. Chavegrin, B. note to Cr. 28 novembre 1902 et seq. S.1904.1.57 at 58: "Il faudrait une hardiesse vraiment excessive, pour attribuer un pareil libéralisme au Code pénal."
110. See Guillemon, *De la Rébellion et de la Résistance aux Actes Illégaux* (thesis), *supra*, pp8-9; Chavegrin, B., note, *supra*, at 57; Cammas, S., *La Légitime Défense, supra*, 202.
111. Guillemon, *supra*, pp8-9; Chavegrin, B., *supra*, at 57. Contra Le Sellyer, *Traité, supra*, 297-8.
112. Cf. Merle et Vitu, *supra*, 515.
113. Cf. eg Cr. 30 avril 1847 S.1847.1.627 (.....), 629: "... le dépositaire de la force publique, au contraire, est toujours présumé, lorsqu'il agit au nom de la loi, ne faire que ce qu'elle lui prescrit ou lui permet..." cf. Bouzat et Pinatel, *supra*, Vol. 1 361-2: "toutes les fois qu'ils se présentent en cette qualité". in Cr. 15 octobre 1824 B.C. no.140 (Voisin), the court skilfully defeated the appellant's arguments by reasoning that even though the mayor involved had acted *ultra vires* and had "abused the authority vested in him as an agent of the administration", the gendarme whom he summoned was acting for the execution of the law. C.p. *Bentley v Brudzinski* (1982) 75 CAR 217.

114. Cr 29 janvier 1974 B.C. no.42 ; Cr 11 octobre 1821 B.C. no.161 : "Toutes les fois qu'on veut forcer la volonté d'un citoyen, s'introduire dans son domicile et faire un acte quelconque qui puisse rendre la rébellion inexcusable, il faut sans doute que l'officier soit revêtu de son costume." Cf. Cr 3 brumaire An XIV B.C. no.224 ; Dalloz Encyclopédie (1977) "Rébellion" no.22. See also Le Sellyer, *Traité*, supra, p307. It appears that it is for the prosecution to prove that the accused did know that he was faced with officers of the law - Encyclopédie Dalloz, supra no.22, citing also Garçon, supra, Article 209 no.103.
115. See the reasoning cited in Le Sellyer, *Traité*, supra, p298; c.f. Cr 13 mars 1817 S.1817.1.296, Cr 30 avril 1847 S.1847.1.627 .
116. Supra, Chapter 3; Delmas-St.Hilaire, J-P., *Jurisclasser Pénal "Faits Justificatifs"* no.128; c.f. Le Sellyer, supra, p298.
117. E.g. Cr 22 août 1867 S.1868.1.142 ; Cr 29 février 1884 B.C. no.60 ; Cr 28 novembre 1902 S.1904.1.57, note Chavegrin; Cr 3 mai 1961 B.C. no.234.
118. Cf. Cr 13 mars 1817 S.1817.1.296; Cr 30 avril 1847 S.1847.1.627, and see *Code pénal* Articles 184-86.
119. Nevertheless, see Cr 13 mars 1817, supra; Cr 30 avril 1847 supra.
120. Chavegrin, E., note to Cr 28 novembre 1902 et seq. S.1904.1.57; cf. Guillemon, P., supra, 53-4; Chammas, S. supra, 219.
121. France has, in relatively modern times, habitually been characterised by a very highly centralised state structure, which may well partly account for the revulsion felt at the possibility of civilian resistance. And whereas we have in Britain a system of constabularies or regional police forces, in France the main police force is a national one, the *Police Nationale*, directly under the authority of the Ministry of the Interior. The strong distinction which follows from this between police and private citizens, whatever theory may say, is abundantly clear from a reading of, *inter alia*, Cr 13 mars 1817 S.1817.1.296 (Boissin) and Cr 30 avril 1847 S.1847.1.627 (Pietri). Note also the quite remarkable concordance between the texts of these two cases; all the more striking given the thirty years which separate them.
122. Cr 13 mars 1817 supra; Cr 14 avril 1820 S.1821.1.218 (.....); Cr 22 août 1867 S.1868.1.142; see also the stirring speech of M. le Procureur-Général Persil before the Cour d'assises de la Seine 13 mars 1832 in the celebrated Carrel affair, reported in S.1832.2.178; also Tribunal correctionnel de Lille 12 février 1948 D.1948.350 .
123. *La Légitime Défense*, supra, 216-7.
124. S.1832.2.178, 182. C.f. Guillemon, P., *De la Rébellion ...* supra, p56; Chammas, S., *La Légitime Défense*, supra, 216-7. See also *R v Fennell* (1970) 3 All ER 215, per Widgery, LJ at 217.
125. See the cases cited by Le Sellyer, *Traité*, supra, p305 and Chavegrin, E. note S.1904.1.57, 58; also Guillemon, P. *De la Rébellion...*, supra pp47-48.

126. Tribunal correctionnel de Nancy 12 novembre 1880 cited Guillemon, P., *supra*, 48. Ironically, the decision was reversed on appeal.
127. Chavegrin, E. note S.1904.1.57, 57.
128. See the article by Armand Carrel in *Le National* 24 janvier 1832, and the subsequent trial by the Cour d'assises de la Seine 13 mars 1832 S.1832.2.178; also Carnot, *Commentaire sur le Code pénal* (1836) Vol 1..
129. Cf. Garraud, R., *Traité Théorique et Pratique du Droit Français* (1888 ed.) p.403; Le Sellyer, *Traité, supra*, p294.
130. Cf. Le Sellyer, *Traité, supra*, p294; and see for example *R v Tooley* 2 *Ld. Raym.* 1296.
131. "...Il y a quelques cas où il est permis à celui qu'on veut emprisonner, de faire résistance; et cela a lieu principalement lorsque celui qui veut arrêter, est sans caractère; ou lorsqu'ayant caractère, il n'a point de marques de son ministère; ou bien, lorsqu'il est porteur d'un mandement ou décret d'un juge sans caractère; ou lorsqu'il a excédé son pouvoir; ou qu'il n'a point observé les formes de justice ..." quoted by Le Sellyer, *supra* 301.
132. Serpillon, *Code criminel - ou Commentaire sur l'ordonnance de 1670* (Lyon 1767), *supra*, Titre XVI, Article IV, no.4.
133. They appear to have failed to ask the obvious question, namely, why in that case the legislature had not simply incorporated it into the new Code.
134. Thus the present writer endorses the view taken by, for example, Le Sellyer, differentiating between the solution one reaches on an abstract analysis of the law, and on an appreciation of its practical application. He sees absolute resistance as an ideal, but no more - *Traité, supra*, pp294 et seq.
135. Indeed, the whole argument presumably is that there is no such thing as a minor irregularity in this field; it is by definition serious.
136. Vitu, A., *Jurisclasser Pénal, supra*, Article 209 no.45.
137. Williams, G., *The Requisites of a Valid Arrest*, (1954) *Crim.L.R.* 6, 10.
138. (1966) 3 *All ER* 931.
139. (1981) 72 *CAR* 193.
140. See Scotsman 5th February 1985.
141. Cattan, V., *La Légitime Défense*, (thesis) Bordeaux 1972, p.92.
142. "Lorsqu'un huissier procède à une saisie irrégulière ou lorsqu'un policier pénètre illégalement chez un particulier, on peut admettre sans inconvénient que foi est dû au titre dont ils se prévalent." Merle et Vitu, *supra*, Vol.1 p515; Garçon, *supra*, A328 nos.73-83 seems to approve of the distinction.

143. Merle et Vitu, *supra*, Vol.1 p515.
144. This example incidentally shows how action may be without lawful authority (the order itself) or alternatively the means by which it is executed may be illegal - or, as here, both together.
145. "*Lorsqu'un fonctionnaire ou un officier public, un administrateur, un agent ou un préposé du Gouvernement ou de la police, un exécuter des mandats de justice ou jugements, un commandement en chef ou en sous-ordre de la force publique, aura, sans motif légitime, usé ou fait user de violences envers les personnes, dans l'exercice ou à l'occasion de ses fonctions, il sera puni selon la nature et la gravité de ces violences, et en élevant la peine suivant la règle posée par l'article 198 ci-après.*" (emphasis added); Garçon, *supra*, A328 nos.73-83.
146. This selection of Article 186, an incriminatory article, as the basis of a right of resistance, evokes the last of three situations identified by Garraud (*supra*, 1888 edition) as giving rise to private defence: "*si (la résistance) était opposée à un fonctionnaire voulant faire un acte défendu par un texte précis de la loi.*" See Garçon, *supra*, A328 no.75.
147. See *supra*, Chapter 4.
148. See for example, Paris 31 octobre 1955 D.1956.S.57, cited Cattan, V., *supra*, 96.
149. A further (arguably unjustified) criticism of Garçon, is levelled by Chammas. He questions the former's emphasis on Article 186, carrying as it does the expression "*motif légitime*"; where this is lacking, says Garçon, then resistance is permissible. Chammas (p210) faults Garçon for relying upon the expression, when it is so heavily laden with elements of a subjective nature. "*Or, avec ce critère subjectif, nous aboutissons à un arbitraire total où la simple croyance de l'agent à la licéité de son comportement interdirait à celui qui se trouve menacé, de réagir légitimement.*" But, firstly, it is clear from a reading of Garçon that, whatever purely linguistic inferences one may draw from the word "*motif*", he restricts it to purely objective, legal terms. Secondly, it seems anyway to be the case that this question of "*motif légitime*" is left to the appreciation of the courts, which proceed on an objective basis - c.f. Cattan, *supra*, 91.
150. *Gazette des Tribunaux*, 14 septembre 1826.
151. See for example Garraud, *supra*, (1888 edition) p403; Vasseur, *Des Effets en Droit Pénal des Actes Nuls ou Illégaux d'après d'autres Disciplines*, RSC 1951 1.
152. Donnedieu de Vabres, *supra*, p237
153. E.g. Garraud, *supra*, (1888 edition) p403; Cattan, V., *La Légitime Défense*, *supra*, 87-88. Subject to what follows, the writer would submit that in general resistance would not be permissible in such cases.
154. Cattan, *supra*, 87; c.f. Garçon, *supra*, Article 328 no.76 (subject to the present writer's reservations, *supra*, regarding his heavy emphasis upon Article 186).

155. (1978) 3 All ER 1098.
156. (1966) 3 All ER 931.
157. (1981) 72 CAR 193.
158. Tribunal correctionnel de Lille 12 février 1948 D.1948.350 .
159. (1970) 2 WLR 562, *supra*.
160. D.1953.S.60.
161. Tribunal correctionnel de Lille 12 février 1948 D.1948.350 - "une résistance passive, une protestation, un recours à l'autorité compétente suffisent à la protection du droit." On the facts of the case the accused was convicted.
162. See for example Cr 3 mai 1961 B.C. no.234.
163. Encyclopædie Dalloz, *supra*, "Rébellion" no.11 and the cases cited therein.
164. *La Légitime Défense*, *supra*, 89.
165. Contrary to the opinion expressed by Cattan, (*supra* 89) the decision, in allowing the use of violence in resistance, is not entirely without precedent; see Cr 7 avril 1837 S.1838.1.641 and Cr 25 mars 1852 B.C. no.108 . These cases are, though, generally considered as uncharacteristic of the view traditionally taken by the *Cour de cassation*, and therefore of minimal authority; contra, Vitu, A., *Jurisclasseur Pénal*, Articles 209-221, no.52.
166. Le Sellyer, *Traité*, *supra*, 295, 298-9.
167. Chavegrin, E., note, S.1904.1.57, 59.
168. E.g. Le Sellyer, *supra*, p295; Chavegrin, E., *supra*, 59; Chammas, S., *supra*, 221-3. In all fairness, Chammas does appear to employ the term as an indication that the offence is one of strict liability in relation to the illegality of the act in question; but even if this is so, one may have reservations about such a use of the word "flagrant".
169. The words are often used interchangeably. The *Tribunal correctionnel de Lille* in its judgement of 12 février 1948, *supra*, used the term "manifestement illégale" but it is clear that the court meant by that serious illegalities in an official's behaviour. See also Bouzat et Pinatel, *supra*, Vol. 1, p362.
170. This appears to be the view taken by the Court of Appeal in *R v Fennell* (1970) 3 All ER 215, *supra*. Note however that this issue of strict liability only relates to questions of law (or arguably, of mixed fact and law). The normal rule of *mens rea* relating to private defence against physical attack remains untouched. A reasonable, though mistaken, belief that a police officer is going to kill one, in the absence of any violence directed against him is clearly an issue of fact, and may obviously result in acquittal.

171. Note that this is entirely separate from and without prejudice to the strong case there exists for punishing those individuals who act *prima facie* in a criminal fashion, in circumstances which nevertheless would objectively justify his action, but of which he or she is unaware at the time.
172. Although clearly it could be of value to the accused in mitigation of sentence.

CHAPTER 6

EXCESSIVE DEFENCE

1. Introduction

Hitherto, we have examined the rules according to which the legality or otherwise of allegedly defensive force falls to be judged. What, then, of the cases where these boundaries are overstepped ? Clearly, one's actions are liable to sanction under the criminal law, and where the offences are non-fatal, the existence of any elements of private defence may count towards mitigation of sentence. This principle is accepted in all three jurisdictions. ¹

Far more problematic, however, is the situation where one's actions have resulted in the death of an alleged aggressor, with the triers of fact adjudging one's 'defensive' riposte to have been somehow excessive, in effect degenerating into an attack. Evidently, in some instances the circumstances will be such as to suggest mere brutal revenge on the part of the accused. But this will not always be so, and it has been a matter of much debate whether in some cases the existence of an 'imperfect plea of self-defence' may suffice to obviate the possibility of a murder verdict being returned.

In Chapter Three we saw the special manner in which the French courts have tackled the difficult area of excessive defence especially in cases of homicide. So far as the common law is concerned the rationale for allowing a manslaughter verdict has been stated as resting on the view that:

"...the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary falls short of the moral culpability ordinarily associated with murder." ²

And in recent times, it is the Australian judiciary who have been largely responsible for developing the doctrine of 'excessive defence' which urged recognition of this alleged distinction. It is proposed therefore to examine critically the manner in which the doctrine has been developed there, before attempting to relate it to any features of the law here. An analysis of the former may indeed assist in our examination of the way in which the courts in England and Scotland have treated the matter.

2. The High Court of Australia and R v Howe

The decision which undoubtedly brought the doctrine to the fore was that rendered by the High Court of Australia in *R v Howe*.³ The accused was found guilty at his trial of the murder of one Kenneth Millard and his account of the events leading up to the death was as follows: he and the deceased, whom he already knew, were sitting in the former's car, drinking wine, when suddenly Millard leaned over and touched his private parts. The defendant, with manifest displeasure at what he had done, ordered him out of the car. Millard complied, and the defendant got out also. The deceased walked about three metres ahead of the car, and although he was unable in court to explain why, Howe walked towards him, whereupon Millard attacked him. Howe panicked, ran back to the car and took out a loaded rifle. He fired one shot into Millard's back, which proved fatal.⁴ On being convicted and sentenced to death, Howe appealed to the Supreme Court of South Australia, relying on two lines of objection, the second of which was the trial judge's alleged misdirection that:

*"... (the accused) has no defence at all, if ... the jury are satisfied that the killing took place ... (using) more force than is necessary for mere defence, the result being that the person who kills is guilty of murder."*⁵

The appeal was allowed, and a new trial ordered, and from this decision the Crown appealed to the High Court. The High Court was unanimous in refusing the appeal and upholding the principle of excessive defence as a qualified defence to murder, although the five justices split three to two on the precise formulation of the doctrine. The 'majority' decision was delivered by Dixon, C.J., whose judgement contained the following key passage:

"The assumption made for the purposes of this question is that a man actually defending himself from the real or apprehended violence of the deceased had used more force than was justified by the occasion and that death has ensued from this use of excessive force. In all other respects, so it is assumed, the elements of a plea of self-defence existed. That is to say it is assumed that an attack of a violent or felonious nature, or at least

of an unlawful nature, was made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage. This would mean that an occasion had arisen entitling the person charged with murder to resort to force to repel force or apprehended force. Had he used no more force than was proportionate to the danger in which he stood, or reasonably supposed he stood, although he thereby caused the death of his assailant he would not have been guilty of either murder or manslaughter. But assuming that he was not entitled to a complete defence to a charge of murder, for the reason only that the force or violence which he used against his assailant or apprehended assailant went beyond what was needed for his protection or what the circumstances could cause him reasonably to believe to be necessary for his protection, of what crime does he stand guilty? Is the consequence of the failure of his plea of self-defence on that ground that he is guilty of murder or does it operate to reduce the homicide to manslaughter? There is no clear and definite judicial decision providing an answer to this question but it seems reasonable in principle to regard such homicide as reduced to manslaughter, and that view has found the support of not a few judicial statements to be found in the reports." 6

With this decision, the existence in the law of Australia of a qualified defence to murder, posited upon an excess of force - unreasonable, but nevertheless used in the belief that it was truly necessary - was unanimously affirmed. One of the most important features of the decision was the difference of opinion among the justices as to the lowest level of gravity of attack which would permit the possible operation of the qualified defence - the 'threshold' level. 7 This element was responsible for much of the subsequent debate surrounding the 'new manslaughter' as it was termed, and called into question the legal principles on which Howe and later decisions were ostensibly based - a point to which we shall return later. For the moment, though, it is worthwhile turning to consider another major decision concerning excessive defence, one which has been the flagship of the lobby arguing against such a qualified defence.

3. The Privy Council and Palmer v R

Palmer v Reginam, * which we considered in Chapter Two, concerned an appeal from the Jamaican Court of Appeal to the Privy Council against a verdict of murder. The evidence contained several confusing and conflicting accounts of what took place, but what is certain is that the appellant and two associates were being pursued through a thicket by a number of men who believed they had made off with an illegal narcotic without paying for it. The Crown case was that the appellant had fired through the bushes to halt his pursuers, killing one of them. Palmer claimed that the shot was fired by someone else, but the trial judge gave a direction on self-defence. * He refrained, however, from giving any direction on manslaughter, viewing that there was no evidence to support such a verdict. Counsel for the appellant argued that a direction on excessive self-defence along the lines of R v Howe should have been given, but this submission was rejected by the Privy Council, whose judgement, it will be recalled, was delivered by Lord Morris of Borth-y-Gest.

His Lordship declared:

"... If there has been no attack there will be no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weight to a nicety the exact measure of his defensive reaction. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was reasonably necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider ... that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a

homicide case the circumstances may be such that it will become an issue whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury." 10

(emphasis added)

Earlier in the judgement appeared the following passage:

"If on the evidence in a case the view is possible that though all questions of self-defence and provocation are rejected by the jury it would be open to them to conclude that although the accused acted unjustifiably he had no intent to kill or to cause serious bodily injury then manslaughter should be left to the jury. But it is not every fanciful hypothesis that need be presented for their consideration." 11

On the face of it, this decision, while rejecting the Howe formula, nevertheless seemed to compensate amply by providing for a highly indulgent view to be taken of the accused's actings, if they rested on good faith. And indeed, we saw in Chapter Two Palmer influences the approach adopted by some English courts in their interpretation of private defence.

Critique of Palmer

However, a moment's reflection shows that this fails to meet the point. The Privy Council had in fact failed to address the true issue - that it is a necessary assumption of the plea of excessive self-defence that what is in question is precisely an unreasonable use of force. Lord Morris's indication of the clement attitude which juries would be expected to adopt camouflaged the fact that their Lordships excluded the possibility of a manslaughter verdict on the basis of excessive homicidal force.

Secondly, the Privy Council took the view that someone who kills by way of excessive force has the requisite mens rea for the crime of murder.

However, it is not entirely clear that this disposes of the issue of excessive defence. They approved the trial judge's direction, which was expressed in the following terms:

*"You can only find him guilty if the Crown has so satisfied you that you can feel that it was the (appellant) who deliberately and intentionally fired the shot that killed Henry if, with the intention at the time of doing so either to kill or inflict grievous bodily harm and further that at the time of doing so he was not acting in lawful self-defence."*¹²

At first sight this would appear to dispose entirely of the question of manslaughter as far as excessive self-defence is concerned. Now, in contrast, their Lordships recognised that while there was no room for a qualified plea of self-defence, there might still be the chance, on the same facts, of a finding of provocation which would of course give rise to a manslaughter verdict.

In light of this, the incongruous and problematic nature of the verdicts demanded by the principles expressed in Palmer is self-evident. For consider the following: if one killed while under provocation, one may nevertheless have had an intention to kill or cause grievous bodily harm, and therefore have had the *mens rea* of murder.¹³ Clearly, the *actus reus* of murder is also present, and so *prima facie*, we have the constituents of a successful conviction for that offence. However, in the appropriate circumstances, if provocation is found, the offence becomes one of manslaughter only. Yet, this has arguably neither altered the quality of the *mens rea* nor affected the *actus reus* of murder.

One can only conclude, therefore, that the operation of a plea of provocation must be by way of superimposition upon the two.¹⁴ Thus, Palmer accepted that malice aforethought might be present, yet unhesitatingly - and quite rightly - conceded that a verdict of manslaughter might well be available.

Applying this, then, a 'classic' case of private defence would, on the lines of Palmer justify outright acquittal on a charge of murder, and rightly so. If, on the other hand, the defender was so incensed by the outrage upon his person that he passed to the offensive, and intending grievous bodily harm or to kill, in the heat of the moment fatally wounded his attacker, then he would not merit acquittal - but he could hope to be convicted of manslaughter. Consider, in the third instance, the case where he fought back and managed to overpower his assailant, yet in cold blood, without feeling provoked, and knowing full well that he was master of the situation, killed his former assailant. Such a person would, all other things being equal, deserve conviction of murder. Yet this is precisely the same verdict which would be returned against the man who, stimulated into defensive action against a serious assault - and let us assume they are all of the same gravity - deliberately and knowingly used deadly force, in circumstances where the reasonable man in his position would have considered such force to be unnecessary. However, there is a world of difference between someone who uses force not "*done in (justifiable) self-defence*" - for that is what the court in Palmer actually meant - and someone who gratuitously, and without excuse or mitigation attacks another. The Privy Council, though, declined to give judicial recognition to this distinction, attaching to both the label of a murder verdict.

It is clear that the decision in Palmer is wholly irreconcilable with the judgement in R v Howe.¹⁷ Provocation and lack of intent to kill or cause grievous bodily harm do not suffice so far as the situations of excessive defence are concerned, for in most cases it is clear that the accused did intend to inflict serious harm at the least. As for Lord Morris's "*most potent evidence*" it does not, as recognised by at least one commentator,¹⁸ meet the point, for what is at issue is an unreasonable belief.¹⁹

Equally, the precise manner in which Palmer was decided is open to criticism. Consider the following quotation from the judgement, coming after a review of the authorities:

"... If in any of the above cases there is a suggestion that a measure of dispensation or

tolerance, where a death is intentionally and unnecessarily caused, is to be found in the circumstances that someone is acting on an illegal warrant or ... executing process unlawfully, it is not one that commends itself to their Lordships ... If more force than necessary is used it is not justified." ²⁰

The passage contains two startling statements. Firstly, there is the bald assertion that their Lordships disagree with counsel's submission. No attempt is made to explain why this is so, and the argument is immediately dismissed. The second assertion, with the greatest of respect, seems decidedly inapposite in the present discussion, for as one writer so rightly commented "Excessive force ... will never be justified - the question at issue is what criminal liability should attach to such behaviour." ²¹ (original emphasis)

Likewise, in De Freitas v Regina, ²² a case which the Privy Council specifically approved, the following rationale for the court's decision is to be found. Having set out the series of questions which a jury would have to pose themselves, in order to exhaust the possibility of full acquittal, and of a manslaughter verdict due to excessive self-defence, Marnan, J. said:

"Any development of the law which would require the jury to go through this complicated and difficult process in reaching their verdict is most undesirable. The conduct of the prisoner in such cases should be judged according to the standard of the reasonable man." ²³

Yet again, it is difficult to identify the legal principle supporting the decision. Now, admittedly, the criticism alluded to by Marnan, J. is one which cannot be lightly dismissed, but it appears to be used in place of any identifiable legal principle. The criticism is then used by the court as a much-needed springboard onto the assertion that the operative, and only standard is that of the reasonable man. ²⁴

4. Developments since Howe - R v Enright and R v Tikos

These, then, are the major criticisms which may be directed at the manner in which the Privy Council rejected the principle of excessive defence. But now it is proposed to scrutinise in some detail the application of the doctrine in the recent caselaw, and the expression which it has found in the series of decisions delivered since R v Howe. In so doing, the writer hopes to identify some defects in this qualified defence to murder, the origins of which, it is submitted, can be traced back to the very decision in Howe itself. And as such, it will be possible to see in a rather different light the stance adopted by the anti-excessive defence school, as typified by the decision in Palmer.

Dixon, C.J., it will be remembered, formulated in Howe a model of the doctrine which, in its enumeration of the types of attack covered, was expressed in rather wide terms. In placing the threshold level at "*insulting usage*", his words implied that a relatively mild assault - *which would clearly give rise to a correspondingly moderate riposte for a full, justificatory plea* - could equally suffice to form the basis of the qualified plea of excessive defence, in some situations.

Just one year later the plea of excessive self-defence came up again for consideration in R v Enright,²⁵ a case involving not only the qualified defence but also pleas of provocation and insanity. The appellant, who had a long history of unstable employment and abodes, had befriended an elderly man, one Robertson, in a hostel at which they both happened to be staying, and they decided to set off together in search of work. At some point an argument arose, inflamed by the deceased calling the appellant a bastard, which the former knew would, by reason of Enright's illegitimacy, infuriate him. The appellant successfully fended off a mild assault on him, but, on his evidence feared another attack, although the deceased was unarmed. He beat the latter to death with a piece of wood, while Robertson was still lying on the ground, and was subsequently convicted of murder. On appeal to the Supreme Court of Victoria, a retrial was ordered on grounds unrelated to the topic of this study, but what is of importance is that the Full Court firmly rejected on the facts of the case counsel's submission on behalf of the appellant that the trial judge should have given a direction on excessive

self-defence. The crux of the decision on this point is set out in the following passage:

"A killing is not reduced from murder to manslaughter under (the Howe) rule unless the accused would have been entitled to be acquitted altogether upon the ground of self-defence, except that the force used by him went beyond the limits as to necessity and proportion which the law imposes upon self-defence. There must be nothing whatever standing in the way of an acquittal on the ground of self-defence other than this excess in the force that was in fact used. But in a case such as the present, in which an intention to kill or to do grievous bodily harm is one of the elements of the crime charged, no issue of self-defence arises at all unless there is evidence of an attack, or threat of attack, of sufficient gravity to make it a question for the jury whether action involving at least some intentional infliction of grievous bodily harm would not have been justifiable in self-defence. If there is no evidence of an attack, or threat of attack, of that degree of gravity then there is something standing in the way of an acquittal on the ground of self-defence apart from the amount of force in fact employed by the accused. That something is, that what he was defending himself against was not of sufficient gravity to provide any foundation for a plea of self-defence to the kind of charge laid, because it was a charge in which an intention to kill or to do grievous bodily harm was one of the elements." 26

(emphasis added)

The decision in Enright was considered shortly after in R v Tikos (No. 2), 27 another case from the State of Victoria. The appellant, a Hungarian immigrant, spent several days with a fellow Slav whom he had chanced to meet, and who generously took him in and helped him find employment. On his version of the facts, the construction site on which he had secured a place was deserted when he presented himself for work. So, making use of some money which the deceased, Patetl, had given him, he wandered around aimlessly and went drinking. Eventually, he returned to the deceased's house, with the inference possible that he did so with a view to

sleeping off his drunkenness. What is clear is that Patetl was in the house when he got back, and apparently, armed with a shotgun, he became rather obstreperous, and forced the appellant into the house. But at his trial on a charge of murder, two materially different accounts of what then occurred were given by Tikos, one of which was that a struggle ensued during which Tikos gained possession of the gun but, fearing an attack by (the unarmed) Patetl he shot him once in the chest. 2*

Following his conviction and appeal, a retrial was ordered resting on the trial judge's failure to direct on excessive self-defence, the Full Court holding that on the facts related in the above version of the events leading up to Patetl's death, it was still possible to accept that the appellant had genuinely, albeit unreasonably, feared death or grievous bodily harm, despite his being in possession of the gun. At his retrial he was again convicted of murder, and so on appeal attacked the direction on excessive defence itself. This appeal was dismissed, with the Court specifically approving of the test as formulated in *R v Enright*:

"Accepting the Enright test, we think it would, in a case like this, be proper to tell the jury that if they considered that the particular occasion warranted the infliction of some form of grievous bodily harm - but was not such as to warrant the firing of the gun at and in close proximity to the deceased so as very likely to cause his death (although the accused's intentions may have been only to do grievous bodily harm) - then the accused should not be wholly acquitted on the ground of self-defence, but he would be guilty of the crime of manslaughter.

But if the occasion did not call for the infliction of any degree of grievous bodily harm, he would be guilty of murder." 2*

(emphasis added)

So, less than five years after the High Court's *tour de force* judgement in *R v Howe* there were already serious moves to challenge the wide sweep of that decision.

5. The 'Limitation' on Howe

But what exactly lay behind the emphatic assertion as to the precise limits of the qualified defence ? What was the rationale behind the limitation apparently placed upon Howe ? It is submitted that far from putting an unjustified 'gloss' upon Howe, the Victorian Supreme Court, in its delimitation of the scope and operation of the doctrine of excessive self-defence, did no more than quite faithfully apply the very principle of Howe itself, and that accusations of judicial contumacy were wholly unfounded.

The rationale behind the Tikos and Enright decisions is to be found in the passage from the judgement of Dixon, C.J. in R v Howe, which has since been repeated in various forms in many judgements. Let us examine it more closely:

"... But assuming that he was not entitled to a complete defence to a charge of murder, for the reason only that the force or violence ... used ... went beyond what was needed for his protection or what the circumstances could cause him reasonably to believe to be necessary for his protection, of what crime does he stand guilty ?" 30

It is only reasonable, then, to assume that the Victorian Supreme Court quite correctly understood that the doctrine of excessive defence, thus propounded by the High Court of Australia, demanded that all elements of a plea of self-defence justifying an acquittal be made out other than that relating to the necessity requirement. In other words, any breach of the *proportionality* rule would be fatal to a plea of self-defence, for this would involve an evaluative divergence, a situation where no reasonable man would have thought the occasion could ever have justified the infliction of harm resulting in the death of the assailant, or creating a substantial risk thereof.

On close examination, this is obviously what forms the basis of the 'restriction' imposed by the Victorian Supreme Court in raising the threshold level above that apparently envisaged by Dixon, C.J. in his examples of the

kinds of attack which would lay the basis for the qualified plea. This is confirmed by the following passage in R v Tikos (No.2), referring to Howe:

"The Chief Justice concludes his judgement by saying that the consequences of the failure of a plea of self-defence where it fails only because the deceased's death was occasioned by an excessive use of force, that is to say, by force going beyond what was necessary in the circumstances or might reasonably be regarded in the circumstances as necessary, is to reduce what might otherwise be murder to manslaughter." 31

(original emphasis)

The Supreme Court evidently balked at the exposition of the doctrine in such wide terms that it could only be construed as impliedly encompassing, by accident or design, breaches of both requirements relating to defensive force, when in terms of principle the plea was understood to depend upon a breach of the necessity leg only.

Assuming, then, that the decisions in Enright and Tikos (No. 2) were correct in principle, the Supreme Court was consequently, on both occasions, rectifying what it took to be a quite erroneous interpretation of the law relating to homicide committed in justifiable self-defence. For, since the plea of excessive defence demands that the accused would have been entitled to acquittal but for the excess of force, it must mean that leaving aside this defect (necessity) for one moment, he must have had a *prima facie* case for the justifiable use of homicidal force (proportion) - in other words the attack was of such severity that, had the defensive force used been reasonably necessary and had death ensued, such riposte would not have been considered out of all proportion to the harm threatened by the deceased.

And it is this which throws into relief the error which must have been made by Dixon, C.J. in Howe. For the learned Chief Justice explicitly referred to a series of assaults ranging in gravity from serious life-threatening injury, to mere "insulting usage". Now, it is difficult to imagine a great many forms of interference less serious than 'insulting usage'. If his Lordship were correct, then we would appear to have a view of

the law of private defence which permits one to kill in the face of 'insulting usage', so long as it is necessary to do so. This must be wrong. For it would mean drastically rewriting the scope of the defence as it has been understood down the ages, since, as we saw earlier, it has long been held that there must be some degree of measure between the gravity of the original attack and that of the defensive action taken.

Furthermore, if Dixon, C.J. were correct in his exposition of the law, then, bearing in mind that the present interpretation of the plea assumes an excess of necessary force and only that, this would involve virtually throwing the requirement of proportionality to the winds, relegating it to a severely limited rôle at the bottom of the scale of violence. Such a view would totally distort its meaning and contradict the emphasis placed upon it as an integral part of the defence of private defence. Yet, indeed, one finds this approach to the limits of the qualified defence established in some academic circles also. ³²

Résumé

So, we have the situation whereby shortly after Howe the Victorian Supreme Court in Enright and Tikos modified the scope of the defence suggested by the majority view in Howe, insofar as the latter's description by way of concrete examples was concerned. The Supreme Court came under considerable fire for this move, though it was in reality based squarely upon the Howe decision, in accord with the principle as stated by the High Court. The irony in Howe is that the High Court in its judgement had actually approved the decision taken by the lower court (the *South Australian Supreme Court*) when Howe's appeal came before it - but the latter explicitly formulated the law on excessive self-defence in terms virtually identical to those later used by the *Victorian Supreme Court*, as the following demonstrates.

Looking at that judgement, we see that the *South Australian Supreme Court* limited the defence to attacks:

"... where there is danger to life, or grave bodily injury is threatened, or death or such injury might reasonably be apprehended, or the

commission of a forcible or atrocious crime is to be prevented; in other words, to cases where, if the force applied were not excessive, and death ensued, the homicide would be justifiable and no crime would be committed." 33

And later:

"We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder." 34

The High Court expressly stated that it accepted the views of the South Australian Supreme Court. 35 Yet, there is without doubt a divergence between the judgements in Howe at the State Supreme Court and High Court levels, for we have to face the problem posed by "insulting usage", which was referred to by Dixon, C.J..

Nowhere in the Supreme Court report is there the slightest mention of such a mild form of attack; indeed, the above would appear to reject quite categorically the notion of it being included within the scope of the qualified defence. By all accounts, then, the majority in the High Court ignored the precise delimitation of the plea which the lower court had formulated, and indeed gave no indication of the transformation which the doctrine appeared to have undergone in going further to appeal. 36

We have, then, in those decisions upholding the existence of the qualified defence, two conflicting lines of thought. The first, typified by the High Court decision in *R v Home* appears to allow the plea to operate even where one faced a mild interference with one's person. The second, into which category the judgements of the Supreme Court of South Australia in the same case, and of the Victorian Supreme Court in *R v Enright* and *R v Tikos (No. 2)* may be classed, limits the operation of the qualified defence to those occasions involving an attack of such severity as to make it a question of the accused being entitled to inflict at least grievous bodily harm upon his aggressor.

The question which this immediately raises is whether on the one hand, this difference is the result of the High Court taking the view that the doctrine of excessive defence rests only upon a breach of necessity. If so, it would appear to accept that the threat of mere insulting usage is able, *prima facie*, to justify the infliction of grievous bodily harm (ie proportion is satisfied). On the other hand, it might be that the acceptance of such a low threshold of attack proceeded from the view that the doctrine permits of a breach of not only the necessity requirement but also that relating to proportion.

Given that certain dicta which strongly point to the theory of a 'necessity-breach' are to be found in the High Court judgement of Dixon, C.J., concurred in by Justices Fullagar and McTiernan; and given that, by all accounts it is precisely this reasoning which laid the basis of the controversial decisions in *Enright* and *Tikos*, what one faces is actually a dispute over the state of the law on *justifiable* self-defence, which highlights the sore need for a clear and authoritative exposition of the circumstances which will, *prima facie*, provide room for an acquittal on a charge of murder, and by implication, those attacks which are in law considered to be so slight as to exclude entirely the possibility of a not guilty verdict.

In all due fairness to the learned justices, the difficulties are not entirely of their own making. A vital factor contributing to the present confusion over the law on excessive defence was sharply identified in the following statement by Justice Mason in a later case on the doctrine:

"Some of the uncertainty that is said to surround the application of the principle enunciated in Reg. v Howe is attributable not to the principle itself but to the generality of concepts which have been traditionally associated with the crime of murder, such as grievous bodily harm and violence, terms which have not proved to be susceptible of precise definition..." 37

To which one might add that the open-ended concept of reasonableness embraced by the common law has done little to prevent such confusion. 38

6. Critique of Howe

In the writer's opinion, then, the judgement of Dixon, C.J. in R v Howe is unacceptable as the basis of the doctrine, both in logic and in law, containing as it does an unresolved ambiguity between the principle, and the precise manner in which it was expressed. The wide sweep of his famous dictum encompasses far too many situations of self-defence, where the existence of a mere trifling attack is, it is submitted, enough to foreclose entirely the possibility of a manslaughter verdict being returned.

On grounds of principle, too, the Howe formulation is faulty. For if it is true that the necessity requirement is the only element which is defective in an otherwise perfect plea of self-defence, the implication of allowing the qualified defence to operate in situations of "insulting usage" is that a case for justifiable homicide in self-defence may be made out when all that is faced is a very mild form of interference. Furthermore, such an interpretation would mean the removal of proportionality as a major requirement of the law of self-defence.

Assuming then, that proportionality, alongside necessity is an integral part of justifiable self-defence, then there would be only one possible way of accepting the version of the qualified defence apparently adopted by the High Court in Howe. That is, that the plea would be interpreted as allowing for a breach of proportionality also. By this is meant that the doctrine

would operate even in cases of attack where there could be no chance of a full acquittal on a charge of murder, precisely because the infliction of violence resulting in the death of the assailant would be considered wholly out of proportion to the degree of harm which he threatened. But equally, this has to be wrong. For this would mean that manslaughter verdict would be possible when nothing but the shell of a "good self-defence plea" remained.

Furthermore, the suggestion that excessive defence allows for a breach of the rule of proportionality would, in contrast, import an entirely new concept into this realm of the criminal law; for it would permit the reduction from what would otherwise be a murder verdict in the case of a mistake of law. Yet, as we have already seen, *ignorantia juris non excusat*.³⁹

It is submitted that, as a general guide, the version of the law formulated by the Supreme Court of Victoria in the case of *R v Enright*⁴⁰ is to be preferred. The judgements rendered in *Enright* and *Tikos* do appear firmly based on sound legal principle in their understanding that the qualified defence is restricted to a breach of necessity only. This demands a greater degree of seriousness in the initial circumstances of attack before allowing the possibility of the qualified defence coming into play. Such a framing of the law requires that in order to stand a chance of a manslaughter verdict, the accused had to have faced an attack of such gravity as to make it a question of him being entitled to inflict at least grievous bodily harm upon his assailant; with some room left at present for clarification of the law on this latter point.⁴¹

This is the view which was later approved in *R v Tikos (No. 2)*.⁴² This is further the outline of the qualified defence which was espoused by the Supreme Court of South Australia in *R v Home*,⁴³ and which commanded the support of one justice sitting in the High Court.⁴⁴ And it has now been approved by the highest judicial authority in Australia, after the High Court was called upon to consider once more in detail the entire question of excessive self-defence.

7. The High Court of Australia and the Decision in Viro

Viro v The Queen ⁴⁶ concerned an appeal from the Supreme Court of New South Wales against a conviction for murder. The facts, briefly, were that Viro and several accomplices conspired to rob one Rellis, who intended to purchase a quantity of heroin from them. The fatal incident took place inside a motor car, when Viro attempted to stun their victim with several blows to the head from a jack-handle. This, however, failed to produce the desired effect, instead prompting Rellis to defend himself with some vigour. In the result, he was pushed from the car suffering from several knife wounds, one of which - the fatal one - had penetrated the heart.

The main thrust of Viro's appeal was directed on two fronts, ⁴⁶ the second of which took the form of a submission that the jury should have been directed on excessive self-defence, as there was evidence to support the defendant's claim that Rellis had managed to defend himself effectively, and had passed over to the offensive, wielding a knife. The appeal was allowed, in a decision containing seven full, separate judgements. ⁴⁷ In addition, the Court demonstrated a considerable diversity of opinions on the matter of excessive self-defence.

In essence, the debate centred on whether Palmer v Reginam ⁴⁸ or the decision in Howe should be followed. Barwick, C.J. and Gibbs, J. both preferred Palmer, while the remaining justices expressed differing views in favour of the latter, but for a variety of reasons six of them concurred in the formulation of a direction to the jury which must be given in cases of excessive self-defence, formulated by Mason, J., who declared himself to be in favour of Howe. Significantly, though, Justice Mason specifically approved both R v Enright and R v Tikos (No. 2), before proceeding to set out in some detail the task of the jury in a case raising the issue of excessive self-defence. He expressed the view that where the accused reasonably believed that he faced either *death or serious bodily harm* and killed his attacker, he would be guilty of manslaughter only so long as he believed that the force was not excessive.

The expression of the law by Mason, J. placed the minimum threshold of attack significantly higher than that accepted in Howe, but unfortunately,

and inexplicably, his judgement contained the very errors of language which had plagued so many of the earlier reports. While speaking of "excessive force" throughout the major part of his judgement, when he came to enumerate the series of questions which a jury would have to face in a case involving the issue of excessive self-defence, he employed now familiar and regrettably misleading terminology. It is well captured in the fifth item of his series of propositions:

"If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury - did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?" 49

(emphasis added)

With respect, it would have been preferable had Justice Mason maintained a strict separation between the two criteria of necessity and proportion, and not, as it seems, borrowed the latter to express something quite different from its true meaning. 50 The only possible way of construing the above expression in line with the *Enright* and *Tikoa* cases, and given the imposition of a high minimum attack threshold, is to interpret it as meaning proportionate to the quantitative risk of interference as such rather than to the degree of qualitative harm posed by the attack. 51 We see once more an illustration of the difficulties which may arise when the two requirements of necessity and proportion are confused.

One further difficulty remains. Before setting out his series of propositions, Mason, J. stated:

"In so doing I put to one side cases involving threatened violation of or indecent or insulting usage to the accused's person. Accordingly, where the threat of death or grievous bodily harm to the accused is in question and the issue of self-defence arises the task of the jury must be stated as follows ..." 52

Given the stance adopted by the High Court in Vinn, given its apparent approval of the Enright-Tikos formulation and the doctrinal implications of this view, one might well ask why these lesser assaults should be "put to one side" ? Surely the implication of the views expressed in Enright is that, of necessity, attacks of a mild nature are excluded from the operation of the qualified defence. While this can safely be said of attacks at the lower end of the scale, Justice Mason's hesitancy on the matter may perhaps be explained by the present uncertainty which surrounds the limits of application of justifiable self-defence. Once more the dire need for a judicial statement on the current scope of the law is highlighted.

8. Palmer - A Reassessment

In light of this inability to achieve an acceptable level of consensus, particularly in the major judgements - disagreement relating to quite fundamental aspects of excessive defence - and given the failure to state with sufficient clarity the form and application of the doctrine, one may look at the reaction of, *inter alia*, the Privy Council in Palmer v The Queen, and the similar attitude taken by a number of other courts, with a rather more indulgent eye than before. With the pro-excessive defence school seemingly unable to clarify the doctrine, despite several opportunities to do so, it is quite possible to take the view that the Privy Council preferred to take refuge in the certainty offered by the 'hard-line' notion of the consequences of excessive force, rather than venture out into territory which was landscaped in a most hazardous fashion. It is in such circumstances difficult to fault the Privy Council for baulking at a proposed 'innovation' in the law which was so defectively constructed, and the parameters of which were so difficult to identify.

The English Court of Appeal has since followed Palmer, in the case of R v McInnes, ²³ where their Lordships quoted *in extenso* from Lord Morris's celebrated dictum. This is not to say that there is no modern authority for a qualified defence to murder in these circumstances, for despite Lord Parker's description of the plea in R v Hossain, ²⁴ as "a novelty in present times", it had occasionally surfaced in unreported caselaw. ²⁵ However, the writer agrees with the view that has been expressed that "(a)ny

tendency to follow the Australian developments thus seems to have been brought to a full stop" ²² with the decision in McInnes.

Indeed, there is now, it is submitted, further strong reason for believing this to be so. It will be recalled that in Chapter Two we examined the decision in R v Shannon, ²⁷ which appeared to have applied subjectivism in its most advanced form yet; going indeed beyond Palmer, which had stressed that good faith on the part of the accused would be "most potent evidence" that only reasonable defensive action had been taken. Now the decision in Palmer, as applied in McInnes, was not received with great enthusiasm in many circles, and it is submitted that the judgement in Shannon is a direct consequence of this. Arguably, it sought to compensate for the latter's rejection of the plea of excessive defence, and in effect to fill partially the gap in the law for the plea which the Privy Council and the Court of Appeal had declined to recognise. In other words, the message of Palmer was developed and expanded, beyond the intentions of Lord Morris and his brethren, in order to make up for the absence of excessive defence.

If such reasoning is correct, then there are strong grounds for thinking that by their decision in Shannon, the Court of Appeal have effectively closed the door on recognition of the separate plea, at least as the law presently stands. Certainly, the decision in Shannon and the recognition of the qualified defence appear somewhat irreconcilable. Thus, were the Court of Appeal minded to accept finally the doctrine, they would first of all have to reconsider the Shannon.

9. Scotland - The Background

In Scotland, the courts have tended not to share the hostility of their English counterparts to the idea of a qualified defence. However, confusion over the years between the notion of excessive defence and that of provocation has increasingly called into question the juridical soundness of the manner in which the defence has been presented. ²⁸ Precisely what the criteria were remained unclear, and so defective indeed was it in its formulation that in a recent decision, the High Court of Justiciary firmly rejected the possibility of a reduction to culpable homicide, on the basis of

an imperfect plea of self-defence. ⁵⁰ If anything this judgement - which is not without its conceptual difficulties - has notwithstanding Palmer served to widen the gap between the restrictive view of Scots law on private defence, and the law south of the border, in light of the trend in English law in recent years.

An indication of this confusion is found in Hillan v HMA. ⁵⁰ There, it will be recalled, the High Court considered at some length an appeal against conviction for assault. In the course of his judgement, Lord Justice-Clerk Aitchison declared that both provocation and self-defence, while distinct defences, had each a similar dual application, either by way of mitigation or of justification. And speaking of homicide, his Lordship said "... the attack may afford a complete justification for what the panel has done, or it may reduce the quality of the crime, as, for example, from murder to culpable homicide, where the panel has struck in his own defence but with a measure of violence that cannot be justified ..." ⁵¹ Such a conception of the law appeared to be approved by the trial judge in H.M.A. v Kizileviczius. ⁵² There, in a case where the panel stood accused of murder, Lord Jamieson's charge was of particular interest for the further detail it revealed on the nature of the plea:

"... if you think that the accused, having been put in a position of real danger - danger to his life, that is - used unnecessary violence or continued to use violence after the danger had passed which he was not justified in using, but that he did so in the heat of the moment, with no intention to kill and without thinking of the consequences of what he was doing - if you find that, you would be entitled to find him guilty of the lesser crime of culpable homicide. Very much the same thing applies to the plea of provocation which has been put forward" ⁵³

(emphasis added)

Indeed the similarity was very great, and it is precisely against this collapsing of the two pleas which the Court in the later case of Crawford v H.M.A. ⁵⁴ recoiled. There, the panel was charged with the murder of his father, and forwarded a special defence of self-defence. This was,

however, withdrawn by the trial judge, who found no evidence to support the plea, although he did direct the jury on provocation. The jury returned a verdict of culpable homicide, against which the panel appealed. The appeal was dismissed by the High Court, which took the opportunity to set the law straight. While recognising that the same facts might contain elements of both self-defence and provocation, their Lordships stressed that the two were quite distinct. In the words of Lord Justice-General Cooper:

"Exculpation is always the sole function of the special defence of self-defence. Provocation and self-defence are often coupled in a special defence, and often I fear confused; but provocation is not a special defence ... and the lesser plea may succeed where the greater fails; but when in such a case murder is reduced to culpable homicide, or a person accused of assault is found guilty subject to provocation, it is not the special defence of self-defence which is sustained, but the plea of provocation." ⁶⁶

Notwithstanding the remarks in Crawford, the existence of a qualified defence to murder found support in the unreported case of H.M.A. v Byfield and Others ⁶⁶ where Lord Thomson charged the jury that an imperfect plea of self-defence might result in a finding of culpable homicide. ⁶⁷ Tellingly, in that case too, his Lordship acknowledged the similarity with provocation, ⁶⁸ reinforcing the extent to which the two pleas remained intertwined. It was against this background that the High Court of Justiciary decided the case of Fenning v H.M.A. ⁶⁹

Fenning v H.M.A.

The appellant had been convicted, *inter alia*, of the murder of one P. At his trial, he had proffered a plea of self-defence, claiming that he struck the deceased several times on the head with a large stone as a result of being threatened with a knife. The trial judge had charged the jury on both this matter and on provocation. He appealed against the conviction, on two separate grounds, the first of which was that the trial judge should have directed the jury that "even if they were not satisfied the appellant had

acted in self-defence, they could nevertheless find the appellant guilty of the lesser crime of culpable homicide if they considered that, while in a state of danger, the appellant had used unnecessary violence or continued to use violence after the danger had passed, but did so in the heat of the moment without any intention to kill and without thinking of the consequences." 70

The inspiration for this ground of appeal clearly lay in the decision in Kizileviczius. And not surprisingly, particularly in the light of Crawford, the High Court rejected the proposition for the appellant, and ultimately dismissed the appeal, expressly pointing out that the two were irreconcilable. 71 Criticising the judgement of Lord Jamieson in Kizileviczius, Lord Cameron pointed to the procedural differences surrounding pleas of provocation and self-defence, 72 and on the substance, declared that:

"If a special defence fails the only proper and competent verdict is one of murder, unless that defence being rejected, the jury on further renewed consideration of the whole evidence reaches the conclusion that by reason of the degree of provocation held by them to be established, that plea should be sustained to the limited effect of reducing the crime from what otherwise would have been murder to one of culpable homicide." 73

Critique

It is submitted that at the root of the ultimate rejection of excessive defence does indeed lie the defective formulation of the plea in Kizileviczius. The High Court evidently declined to admit the existence of a plea which purported to derive from private defence, but which in effect had many of the hallmarks of provocation. Particularly damaging to the case, it is submitted, was the stress upon the claim that the accused should have been carried away by the passion of the moment, and acted without regard for the consequences of his behaviour. There is little wonder, then, that the courts were reluctant to split hairs and to create seemingly academic

distinctions in the law, by the acceptance of a distinct plea. In addition, it is clear that in many situations the accused may well have acted without so losing control and in good faith, while nonetheless beyond the bounds of reasonableness.

It is submitted, however, that there is room for believing that the formulation of the plea in terms which were by then somewhat discredited induced the High Court of justiciary to "throw the baby out with the bathwater" as it were. For now Scots law appears to have been deprived of the half-way house of a culpable homicide verdict derived from self-defence, through the Court's rejection of the provocation-based plea. Unfortunately, the decision in *Fenning* was characterised by a firmness which bodes ill for any future appeal based upon the notion of excessive defence.

This is particularly regrettable when one considers that in much the same way as *Palmer*, the true issue was never properly addressed. For while it is correct that "*(e)xculpation is always the sole function of the special defence of self-defence*",⁷⁴ this does not exactly meet the point. So far as this ground of appeal was concerned at least, what was at issue in *Fenning* was not self-defence, but by definition, excessive self-defence. It would have been far preferable if, in preceding caselaw, culpable homicide had been framed in terms of the qualified plea, and not related to self-defence proper, for the possibility of confusion was obvious.

We are at the end of the day left with the words of the trial judge, Lord Mayfield, who directed the jury that "*If he (the accused) goes further than is necessary for his defence and uses cruel excess that cannot in law constitute self-defence.*"⁷⁵ This is undoubtedly so - but the illegality of such actions has never really been in dispute. What is at issue, as was said earlier, is what criminal liability should attach to such behaviour. And in the circumstances, one may question whether this matter has been resolved with any degree of satisfaction, in light of the manner in which excessive defence has habitually been presented to the courts.

Lord Justice-General Cooper may have been right in declaring that "*... when in such a case murder is reduced to culpable homicide ... it is not the special defence which is sustained*".⁷⁶ But it is arguably the failure

to provide his Court with a viable and properly formulated alternative to provocation that induced him to declare that the latter was the sole basis for a reduction to the lesser offence, effectively shutting the door, which the High Court, by its decision in Fanning appears to have firmly barred, on the qualified plea of excessive-defence.

10. Conclusion

What then are the implications of this view of excessive self-defence, and in particular, the 'Australian doctrine' ? Indeed, what are the factors which prompt caution in one's assessment of the doctrine ? Firstly, as regards the specific expression of the law which is to be found in Enright and Tikos, the element which instantly attracts attention is the relatively limited scope of the doctrine, due to the imposition of a high minimum threshold of attack. This is particularly so, because if it is a question of one being entitled to inflict at least some form of grievous bodily harm upon one's assailant, then, it must be appreciated, there is a substantial risk that one will by one's actions cause his death any way. It is to be expected, then, that in the great majority of cases the accused would be fully acquitted of any murder charge laid.

But it is possible that the result now would be a more restrictive view of the scope of the law of justifiable self-defence. In short, there is the risk that where an accused would previously have been acquitted, he would, with the arrival of a third possible verdict, be found guilty of manslaughter. Now, the qualified defence was hailed as a welcome means of mitigating the rigours of the common law, given in particular the special plight of the person faced with a serious attack. It was intended at the outset, and should continue to be taken to be aimed at people who hitherto would have been convicted of murder, as they could only proffer an imperfect plea of self-defence.

It is to be hoped, then, that it would not find itself aimed at a displaced target; it is to be hoped that juries would continue to take an indulgent view of the accused's position, giving full credence to the heat of the moment, to the strong element of fear, and to the due measure of

tolerance which has traditionally been accorded someone fighting for his life or the safety of his person. And it is only to be expected that the qualified defence would continue to be targetted at those who clearly had been the focus of attention when the doctrine was first expounded in its modern form: those persons who had acted unreasonably in defending themselves. The doctrine did not alter the existing substantive law on justifiable self-defence, and was not directed towards those who traditionally would have been acquitted. Their position remained - and remains - unchanged.

As for the criticism that the scope of the plea is too restricted, it has been argued that this point is misplaced, in that it is really one step removed from the real issue. Any such attack on the doctrine is really an attack on the present law relating to homicide committed in justifiable self-defence, which in turn determines the parameters of the former. Since, on the Australian version, there must be "nothing standing in the way of an acquittal other than the excess of force", then any calls for a lowering of the minimum threshold of attack, the lowest level of assault which will permit the qualified defence to operate are, until the law on self-defence as a ground for full acquittal is changed, illusory and misconceived.

The case has been argued here for the acceptance of a third possible verdict, where the case for an acquittal fails only by reason of this excess - a principle which, it is submitted, is of equal validity in cases of defence of third persons, as in self-defence. The acceptance by some courts of the principle underlying the doctrine is only to be welcomed. Yet, while the arguments employed in justifying the determined refusal by the Privy Council and the English Court of Appeal to admit of the qualified defence are somewhat open to question, they nevertheless represent the articulation of what is quite legitimate unease over the manner in which the doctrine has been presented in its various forms. The rejection of a qualified defence by these two courts - and in its own way, for different reasons, by the High Court of Justiciary - may indeed prove a blessing ⁱⁿ disguise, for it has highlighted the present needs relating to the law on the use of excessive force in self-defence. And of these there are, in the main, three.

Firstly, a clear and authoritative statement on the legal principle forming the basis of the qualified defence is long overdue. Throughout the series of decisions on this area of the law, there has been not one instance where it was stated in the clearest terms that the doctrine related to a breach of the necessity requirement only, and in no way admitted of any breach of proportion in the sense that this latter term has traditionally been understood.

Secondly, so far as Scots law is concerned, it is essential that any future attempt to present the defence should once and for all break the link which has hitherto coupled it with the plea of provocation, similar though the two may be. For so long as the High Court of Justiciary is confronted with excessive defence as a plea of provocation in all but name, masquerading as a separate plea in its own right, it cannot be faulted for rejecting the 'doctrine'. It is, though, a matter of regret that in the absence of some compensating trend towards subjectivism in the general law of private defence, as in England, this void will, if anything, consolidate the strict standards of private defence which still characterise the law north of the border.

Finally, there is what is perhaps the most pressing requirement of them all, one which goes to the very heart of one's criticisms of the present law on private defence in general. For it is high time that the limits relating to homicide committed in *justifiable* defence were set out with some degree of precision. The trend towards the amorphous standard of the reasonable man is, in many respects, unsatisfactory. It is not good enough for the accused, it is not good enough for the public at large, and it is not good enough for the law, which ought to be able to declare with confidence and authority just where one may tread with impunity, and where, on the other hand, the ice of private defence, which at the best of times is none too solid, becomes treacherously thin, a hazard into which one strays quite literally at one's own risk.

APPENDIX

1. For a particularly vivid example, see Cr 4 juillet 1907 B.C. no.293 (Chevalier de Coutans)
2. R v Vin (1976-78) 141 CLR 88, per Mason, J at 139.
3. (1958) 100 CLR 448.
4. In his evidence he stated: "When I fired the shot, I intended to stop him from further attacks. That's what I say now. I didn't think at all about whether I was likely to kill him. The thought never came into my mind. I was afraid of him. I was angry with him. I didn't think about what I was going to do. It all just came as soon as he grabbed me." - quoted by Dixon, CJ, *supra*, at 459.
5. Quoted by Dixon, CJ, (1958) 100 CLR 448, 460.
6. Dixon, CJ, *supra*, at 460-1.
7. Dixon, CJ, *supra*, at 460; per Taylor, J at 468; per Menzies, J at 471.
8. (1971) 1 All ER 1077.
9. As he was bound to do, being of the opinion that such a finding was possible on the evidence before him: "It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them." - Lord Morris, *id*, at 1080.
10. (1971) 1 All ER 1077, 1088.
11. *Id*. at 1084.
12. *Id*. at 1082.
15. It was at one time understood that provocation negated the existence of malice. Thus, in Holmes v Director of Public Prosecutions (1964) AC 588 Viscount Simon stated (p598): "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negated." However, this proposition was rejected by the Privy Council in Attorney-General for Ceylon v Kumarasinghe Don John Perera (1953) AC 200, which held that one could have the intention to kill or cause grievous bodily harm and still, due to provocation, be convicted of manslaughter only.
16. Cf. Attorney-General for Ceylon v Perera, *supra*, per Lord Goddard at 206: "An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm." (Emphasis supplied).
17. In short, the incompatibility of the two sets of judicial pronouncements on the doctrine of excessive defence can be quite simply stated as the

following: both jurisdictions accept that where excessive defence is at issue in a case involving the death of an assailant, unlawful homicide has been committed. Where they differ is that the High Court of Australia takes the view that the 'honest', albeit unreasonable, belief of the accused in the necessity of defensive action is of great import when it comes to determining the level of moral and legal culpability of the accused. The Privy Council and the English Court of Appeal, on the other hand, reject such a notion. In other words, the argument centres upon the subjective view of the accused even where this is adjudged unreasonable.

18. Leigh, L.H., *Manslaughter and the Limits of Self-Defence* (1971) 34 NLR 685, 689.
19. This was not lost on Justice Mason, in delivering the majority judgement in *Viro v The Queen* (1976-78) 141 CLR 88, another major case on excessive self-defence which will be examined more fully later in this paper: "The principle that the jury may take into account and give weight to the accused's belief as to what was necessary in deciding what a reasonable man in his situation would believe to be necessary itself acknowledges that there is a distinction between the accused's subjective belief and the objective standard which in a given case may prove decisive. If it be correct to say that *Reg. v Howe* is erroneous, and this because in all cases the jury will invariably find an exact correspondence between the accused's subjective belief and the objective standard, then one would expect the law to acknowledge an identity between the two by formulating the principle in terms of the accused's belief or by requiring that the jury be instructed accordingly. Such an approach is denied by *Palmer v The Queen* for the acknowledgment that the accused's belief is "most potent evidence" of the objective standard does not bridge the gap. Indeed the more one reflects upon the approach taken by *Palmer v The Queen* the less reason there seems to be for retaining the objective standard as an element in the defence." - p140.
20. *Supra*, at 1083. C.p. R v *McInnes* (1971) 3 All ER 295, per Edmund Davies, LJ at 302.
21. Smith, P. *Excessive Defence - a Rejection of Australian Initiative ?* (1972) Crim.L.R. 524, 529. See also R v *Emelogue* May 2, 1971, No. 7044/69, quoted in the same article at 527, for another example of defective judicial reasoning.
22. (1960) 2 WIR 523.
23. *Id.* at 537.
24. It adds nothing useful to say that this is the underlying legal principle. Firstly, it is self-evident that when they reject excessive defence as a legal doctrine the court are imposing an objective standard. Secondly, having accepted this to be the case, one is still left asking why it is that the reasonable man should be the only criterion used for determining whether a murder verdict can be avoided; what support and what legal reasoning exists to support such a view. Nowhere in the above case does one find an answer to this question.

25. (1961) VR 663.

26. *Id.* at 668-9. While the judgement in *Enright* was in some respects opened to criticism as a result of the subsequent decision of the Victorian Supreme Court in *R v Tikos (No.2)*, *infra*, this description of the nature and scope of the doctrine of excessive defence, emphasising as it does the close dependence of the plea on the law relating to justifiable self-defence, has in the writer's opinion, in terms of clarity and precision never been bettered.

27. (1963) VR 306.

28. According to the second version, the shooting resulted not from a deliberate act on the part of the accused, but accidentally, while both men held the weapon, endeavouring to dispossess the other.

29. (1963) VR 306 at 312-13.

30. *Supra*, per Dixon, CJ at 460-1.

31. (1963) VR 306, 311.

32. For example, Professor Howard, in an article commenting largely upon the two *Tikos* cases (Howard, C., *An Australian Letter - Excessive Defence* (1964) Crim.L.R. 448) quotes the principle expressed in *Enright* that there must be nothing standing in the way of an acquittal other than the excess of force, then, by way of explanation states (p450):
"The situation postulated is that D was entitled to use force but used too much and in consequence killed V."

This statement immediately communicates the line of thought which he then pursues throughout the rest of the article. For Professor Howard appears to take the view that the mere fact of an attack suffices to bring the accused within the possible scope of the qualified defence. He nevertheless recognised the imposition of a certain threshold level of attack in most decisions, and explained this as follows (p451):
"Nevertheless the courts, perhaps fearing the advent of obviously trivial claims that D thought himself in danger, have repeatedly stressed that the danger put forward must be one which a reasonable man would have thought had some substantiality, although unfortunately the proliferation of judicial attempts to set the limits of the law has led to minor discrepancies between the various statements of this rule."

With respect, the present writer would suggest that the variations exhibited in the caselaw are more than "minor discrepancies" and indicate a considerable degree of confusion among the judiciary about the limits of the doctrine, hingeing in some cases on quite fundamental differences of opinion over the legal principles underlying the defence. If the Victorian Supreme Court placed a limitation on the initial attack threshold it did so not by way of avoiding awkward procedural problems, but, need it be repeated, on the basis of what it took to be a quite elementary requirement of the plea - that all aspects of the case for acquittal are made out except that which relates to the requirement of necessity; such a move is thus demanded as an essential ingredient

of full acquittal by way of self-defence, which itself opens the door to excessive self-defence.

33. *Id.* at 119

34. (1958) SASR 95 (Mayo and Reed, JJ, and Piper, AJ), at 121-22.

35. (1958) 100 CLR 448, per Dixon, CJ at 462 and 464.

36. Unfortunately, though, the emphatic assertions of the courts do not dispose of the matter. In *Tikos* we find the following curious statement by the Full Court (1963 VR 306 at 311), referring to the High Court decision in *Howe*: "We think it clear that each of their Honours' remarks was directed to ... a case in which the accused has been subjected to an attack of such a violent and unlawful nature as to place him in reasonable fear of his life or the safety of his person from injury, violation or indecent or insulting usage."

And later, having quoted with approval the relevant passage from *R v Enright*, ("A killing is not reduced ...", *supra*), the following startling proposition, by way of reconciliation with the decision arrived at in *Howe*, was forwarded (p312): "There is nothing in this passage which is inconsistent with the judgement in *Howe's* case. If a person is subjected to an attack of such a violent and unlawful nature as to place him in reasonable fear for his life or the safety of his person from injury, violation or indecent or insulting usage, then *prima facie* ... he would be warranted in inflicting some degree of grievous bodily harm on his assailant to repel the attack."

Thus, the decision which was elated for restricting the scope of the *Howe* formulation refers explicitly to "indecent or insulting usage", which in reality was the focus of the whole dispute. The discussion has, by all accounts, suddenly and unexpectedly turned full circle. And despite the academic authorities we apparently have a great deal of accord between the views of the Victorian Supreme Court and those expressed by the High Court in *Howe*. However, at this point two problems become apparent. The first is that if the above is true, then the Supreme Court would consequently be guilty of committing the same errors as those made by the High Court. And the second concerns the fact that despite the approval by the latter of a grievous bodily harm riposte in face of insulting usage, and given the fact that it is difficult to see how the threat of an attack upon *Tikos* by Patetl, even with just fists, could amount to less than insulting usage, the Supreme Court of Victoria nevertheless rejected the appeal, explicitly upholding the trial judge's direction on excessive self-defence. One is consequently led to the conclusion that the Court in *Tikos* understood "insulting usage" in a manner far different from that envisaged by the majority in *Howe*.

37. *Viro v The Queen* (1976-78) 141 CLR 88, 144.

38. Furthermore, on reading judgements such as that in *Tikos* the reader is still left to deduce for himself exactly what kind of attack will be of "sufficient gravity to make it a question for the jury whether action involving at least some intentional infliction of grievous bodily harm would not have been justified in self-defence." A clear statement, so

far as this is possible, as to what kind of attacks are envisaged would be far preferable.

39. It is generally held that a mistake of law is irrelevant so far as guilt is concerned, being of relevance in the criminal law, in mitigation of sentence, if at all. While it is possible to build a case for a finding of reduced culpability, both moral and legal, when what is at issue is a mistaken interpretation of internal and external stimuli and items of information, it is altogether a different matter when it comes to the question of an unreasonable evaluation of the consequences of those stimuli, of any rights which flow from them. Whatever one's belief as to the need to persist in inflicting homicidal violence on one's attacker to put oneself finally out of danger, if one is doing so in circumstances where a reasonable man would have considered the death of the attacker wholly disproportionate, then this should be of no avail. That he by some unreasonable factual error thought himself to be within the bounds of the law relating to self-defence is arguably good reason for according him some measure of clemency; but that he, by judging his actions to be worthy and proper, to be justified, sought to extend the boundaries of the law cannot and should not be tolerated.
40. (1961) VR 663, *supra*.
41. And if in fact this was the reasoning followed in Horne by the High Court itself, then the Victorian Supreme Court may be taken to have been fully justified in its reminder to Dixon, C.J. and his fellow justices of the precise state of the criminal law.
42. (1963) VR 306, *supra*.
43. (1958) SASR 95, *supra*.
44. (1958) 100 CLR 448, per Menzies, J at 471: "By way of preface I would observe that what I am about to say is confined to a case of self-defence against serious violence though not necessarily felonious violence." - and at 477: "I have reached the conclusion that the law is that it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant."
45. (1976-78) 141 CLR 88.
46. The first concerned evidence that the accused was intoxicated as a result of an intake of heroin.
47. This was in part due to the fact that the case also raised some important issues of constitutional law.
48. (1971) 1 All ER 1077, *supra*.
49. (1976-78) 141 CLR 88, 147.

50. See Chapter 3, *supra*, for further examples of the confusion between necessity and proportion.
51. Cf. Howard, C., *Two Problems in Excessive Defence* (1968) 84 LQR 343, at 353-4.
52. *Supra*, at 146.
53. (1971) 3 All ER 295, (1971) 55 CAR 551, (1971) Crim. L.R. 649.
54. (1963) Crim. L.R. 852.
55. See for example, the comment to Palmer in (1971) Crim. L.R. 649, 651, and in particular the details of Davies (Bedford Assizes, January 25, 26 & 27, 1965).
56. See comment to Palmer, (1971) Crim. L.R. 649, 651.
57. (1980) 71 CAR 192, (1980) Crim. L.R. 438.
58. See for example Gordon's examination of the background to the confusion: *Criminal Law of Scotland*, *supra*, pp767-8.
59. Fenning v H.M.A. (1985) SCCR 219.
60. (1937) JC 60.
61. *Ibid.* at 58.
62. (1938) JC 60.
63. *Ibid.* at 63.
64. (1950) JC 67.
65. *Ibid.* at 69.
66. Glasgow High Court, January 1976. See Gane, C. and Stoddart, C., *A Casebook on Scottish Criminal Law*, (Edinburgh 1980), pp.354-5.
67. "If you get a situation where you think that the Crown has failed to prove ... such a high degree of wicked recklessness but, nonetheless has established to your satisfaction that the accused acted in an unjustifiable way, that would be enough to reduce the charge from one of murder to one of culpable homicide. Moreover, ladies and gentlemen, and this is perhaps closer to the facts of this case, if you took the view that the defence of self-defence was not established either because, ... the force used in retaliation was excessive or because although the man was petrified, as he says, nonetheless he really ought to have been able to see there was a way of escape and should have taken it: in both those cases the self-defence would fail but in both those cases it would be open to you to say "Well, he shouldn't have done what he did but it is not murder" and in circumstances of that kind the verdict would be culpable homicide." (Quoted by Gane, C. & Stoddart, C., *Casebook*, *supra* p354).

68. "It is sometimes said that this arises from an application of the principle of provocation and you can apply that to this case too. It comes, in a way, to the same thing."
69. (1985) SCCR 219.
70. Cited per Lord Cameron (1985) SCCR 219 at 222.
71. (1985) SCCR 219, at 223 and 224.
72. Ibid. at 223-4: "(Provocation) is a plea which can only properly arise for consideration once the jury has reached a conclusion on the 'special defence' and rejected it. Once that decision has been made, then, and only then, does the plea of 'provocation' become legitimate matter for consideration, and in considering that plea it is for the jury to consider, of new, in light of the directions given by the presiding judge, the whole evidence bearing upon the issue of homicide. The issue of self-defence and the issue of 'provocation' are not only entirely different in substance and effect, but their solution is dependent upon quite distinct and distinguishable factual circumstances, and are not matters of concurrent consideration. Thus, it is only if the evidence of self-defence is rejected that it is then for the jury to consider afresh the whole evidence to determine whether the matter of provocation is established so as to reduce the quality of the crime from murder to culpable homicide. This, I think, requires to be made very clear."
73. Ibid. at 224.
74. Crawford v H.M.A. (1950) JC 67, per Lord Justice-General Cooper at 69, cited with approval per Lord Cameron in Penning, *ibid.* at 223.
75. Quoted in Penning, *ibid.*, at 220.
76. Crawford, *ibid.*, at 69.

CONCLUSION

Any analysis of private defence, by its very nature, invites two quite different approaches. On the one hand, one may examine private defence from a purely academic point of view, according to a theoretical model of the various principles involved. The difficulty here is that in seeking a coherent framework, one loses sight of the practical realities of most situations in which private defence arises and evolves. The inherently human, fallible and unpredictable nature of most confrontations requires that the law be both *adaptable* and *realistic* in its application, taking account of the 'hard facts'. This arguably must be reflected in any study which claims relevance to the topic.

On the other hand, recognition of the plight of an accused, a defender, in the situation of aggression harbours its own difficulties. Sympathy with his or her plight may all too easily lead to the abandonment or neglect of any guiding or restraining principles of law which seek to delimit the operation of the plea. The result can be the presentation of private defence as an absolute right in every instance, susceptible of enforcement by absolute means. The protection of physical and patrimonial 'autonomy', devoid of any notions of proportionate response, becomes the order of the day.

The writer has attempted to follow a middle course between the two, or more accurately, to achieve a combination of elements from both, while endeavouring to avoid the risks which each presents. These risks too are ones which face judges and juries in their decisions, when they find themselves asked, in the cold light of the courtroom, to deliberate upon the propriety or otherwise of actions which raise the possibility of private defence. Such a task is difficult enough for a witness to confrontational incidents. It is doubly so when it has to be done by strangers to the incident, with hindsight, and, in cases of homicide, without the testimony of one of the key participants.

It is not surprising then that the law has, notably in England and Scotland, sought recourse in the past to relatively formalised rules of law. Their value has lain partly in assisting the triers of fact in determining the respective rôles in a combat of the attacker and the attacked, but also,

arguably, as a substantive reflection of the history of private defence as partly a matter of excuse, and not justification.

The classic example has been the duty to retreat, a prime instance of a formalised rule acting as a restraint upon the defensive right. Yet, we have seen that in recent years the interpretation in England of this field of the law has changed, weakening the rigours of the old principle. Instead, we have witnessed the progression towards a view of retreat as more an evidential factor - admittedly, the transformation is far from complete, but the direction seems clear. Similarly, subjectivism appears to have assumed a greater importance, again in England, again in recent years.

Such moves - if indeed the underlying impetus is there - are only to be welcomed. For they reflect recognition by the judiciary of one of the most basic issues of private defence, which defeats the rationale of a purely formalistic approach - that so much depends upon the facts of each individual situation.

Indeed, in a more general way, one may say that the application of the law of private defence must to some extent be jurisdictionally, socially and historically specific. Changing social mores, and shifting attitudes towards property, for example, will in some way determine that what is appropriate defensive force for one period, and for one jurisdiction, may not necessarily be justifiable in another.

However, while due recognition must be given to the varying circumstances in which private defence may arise, one may justly feel that the interests of the defender require that on some matters the law comes down, as a matter of principle, *in their favour* - certainty in the law, yes, but no longer as a matter of restraint. On the precise matter of retreat, for example, the writer would indeed prefer that as a matter of principle, both England and Scotland adopt the 'stand-fast' approach to private defence, permitting one to hold one's ground against unlawful attack. Likewise, the issue of conflict-avoidance.

Similarly, one may question whether the use of 'reasonableness' as a gauge for the limits of permissible force does justice to the individual who

finds himself forced to act in his defence, particularly 'in a moment of unexpected anguish'. One may regret that at present, especially in English law, both matters of fact and decisions of legal policy are very much left in the hands of a jury. Undoubtedly, in the 'grey area' of private defence, such matters must be left to the wisdom and judgment of one's peers. But many cases do not fall into this juridical no-man's land, and it has been argued here that in some instances the judge, the jury and the accused should be aware, through specific examples if needs be, of what exactly constitutes proportionate response. Here, the plight of those persons who find themselves the object of relatively serious attack arguably militates in favour of established rules of law setting out the occasions justifying deadly force, even - in rare instances - in the protection of property.

And it is precisely this view of private defence as an objective matter of justification which has coloured the judicial attitude in France to the plea. This is not to say that the courts have necessarily accorded a wide scope to the operation of the plea, and the limits of permissible force. Much of the modern caselaw controverts this, bearing in mind especially the inquisitorial system which exists there, offering the possibility of pre-trial findings of private defence. That the plea was established early on as an affirmative *right*, however, perhaps explains the absence of any judicial soul-searching on matters such as retreat and the fixed rules derived from pre-nineteenth century law.

The case has been argued here for a strengthening of the right of a homeowner to use serious defensive force in the protection of his dwelling-house, a right which, especially since 1959 in France, seems to have been somewhat weakened in the commendable efforts of the courts to mitigate the rigours of the old law which admittedly lent itself to abuse. It is perhaps ironic that it is English law which presently guarantees most effectively the rights of the individual to protection at night, if modern case law is anything to go by.

So far as the use of automatic defensive devices are concerned, the contention here is that in all but the most exceptional circumstances, the use of these instruments can never extend to ones of an inherently deadly character, breaching as they do the requirement of necessity. However, it is

submitted that they do have a legitimate rôle to play in private defence, and that the law in all three jurisdictions should accept them in principle, subject in general to the normal requirements of necessity and proportion.

On the matter of defence against the police, however, the writer has argued that law in both England and Scotland has much to learn from the experiences of the French. While the latter jurisdiction has witnessed an excessive restriction of the right of private defence in this area, the underlying principle has much to commend itself. In contrast, the law in Britain arguably affords, in principle and practice, an excessive protection from unlawful intrusion, which can bear hard upon individual police officers. It is submitted that the nature of most police-citizen conflicts requires a partial restriction of the normal principles of private defence, in order to achieve fairness to all.

Finally, on excessive defence, this study has attempted to identify some of the problems which have arisen in France through the use of involuntary infractions as a vehicle for a finding of excessive force. It has been argued that the true scope for private defence of the famous 1967 decision alleging the incompatibility of involuntariness and private defence is more restricted than has hitherto been thought. So far as the common law is concerned, the rejection in England of the qualified plea is a matter of regret, although the continuing uncertainty surrounding the various modern formulations of the doctrine does go some way to explaining the hostility of the English courts. Confusion of a different sort has, regrettably, led to the recent rejection of an 'imperfect plea of private defence' by the Scottish High Court of Justiciary.

This last development is indeed to be regretted. As in England, it owes much to the defective formulation of the qualified plea. However, Scots law continues to tread its own path on the full justificatory plea, holding those who use 'defensive' force to quite rigorous standards. There are few signs that the judiciary north of the border are willing to follow their English brethren in the gradual relaxation of the law. This reluctance is, though, understandable in light of the risk that an assertive declaration as to the right of justified violence will be interpreted by the public as a licence to take the law into their own hands.

If one matter is clear, it is that private defence is a subject on which two reasonable men may hold two strongly opposing views. While Scotland remains characteristically restrictive, the impression is that the courts, in England and France, are trying to follow a middle-of-the-road approach. Nonetheless, it is submitted that present law, certainly in Britain, continues to place too great a restraint upon the individual who finds himself the victim of an unlawful aggression.

Ultimately, private defence articulates the question of rights and values, and of the conflict of these rights and values. Each of the parties, individual, attacker and the State, has a stake in some or all of them, at any given moment of conflict. And just where the parameters of private defence are set down indicates a policy decision as to which party or parties, forfeits which rights, to what extent, and in what circumstances.

Hitherto, one may argue, the law of private defence has reflected the particular importance attributed to the interests of the State in this three-way complex. However, two points may be made. Firstly, in practical terms, one may question whether the 'short-term' imposition of restrictions upon defenders does indeed lead to the minimisation of violence in the long-term. Secondly, and more importantly, let it be repeated that private defence is a right, a justification arguably grounded in natural law, not susceptible of serious derogation by positive law. And where in a situation of conflict, an individual finds himself momentarily beyond the protection of the law, and obliged to react defensively, the law has to make a choice. That choice lies between the curtailment of his rights in the pursuit of 'justice to all', and the substantial forfeiture of the rights of his assailant, to ensure effective defence. True, the problems of private defence do not admit of easy resolution, and it is all too easy, from the comfort of an armchair, to criticise the judiciary in their efforts to achieve justice. But if one guiding principle commends itself to the writer it is this: that when an individual faces an unlawful attack, then the law must weigh heavily in his favour - and where, in particular, the aggression is such that it cripples most ruthlessly the victim's ability to retain his composure, in circumstances where a rapid response is required, without the benefit of 'detached reflection', then the choice must indeed lie with 'substantial forfeiture'.